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United States
Circuit Court of Appeals

For the Ninth Circuit.

DAVID C. NORCROSS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.


In the Matter of the Application of DAVID C.
NORCROSS for a Writ of Habeas Corpus.

Transcript of Record.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, First Division.

CLERK'S OFFICE.

No. 15,462.

In the Matter of the Application of DAVID C.
NORCROSS for Writ of Habeas Corpus.

Praecipe [for Copy of Record].

To the Clerk of Said Court:

Sir: Please issue copy of record herein as follows:
Application for writ with exhibits attached thereto;
Order denying same;
Appeal from order;
Order allowing appeal and fixing amount of bail;
Assignment of errors;
Citation on appeal;
Cost bond on appeal;
Admission of receipt of papers.

SAMUEL KNIGHT,
Attorney for Appellant.

4 Oct./13.

[Endorsed]: Filed Oct. 6, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*Page-number appearing at foot of page of original certified Record.

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

In the Matter of Application of DAVID C. NOR-
CROSS for Writ of Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the District Court of the United States in and for
the Northern District of California, First Division:

The petition of David C. Norcross respectfully
shows:

I.

That your petitioner is a citizen of the United States, and inhabitant and citizen of the State of California, and a resident of the City and County of San Francisco, State of California, in this district.

II.

That your petitioner is now, and for several years last past has been, continuously, Secretary of Western Fuel Company, a corporation duly organized, created and existing under and by virtue of the laws of the State of California.

III.

That your petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United States in the custody of C. T. Elliott, Esq., U. S. Marshal in and for said Northern District of California, to wit: At the said City and County of San Francisco, State of California, in said district. [2]

IV.

That the sole claim or authority by virtue of which said C. T. Elliott, Esq., Marshal, as aforesaid, so restrains and detains your petitioner is a certain commitment in writing, a copy of which is hereto annexed, marked Exhibit "A," and made a part hereof.

V.

That said commitment was issued pursuant to an order of this Court made and entered at a stated term thereof held in the United States Courthouse and Postoffice Building, on the corner of Mission and Seventh Streets, in said City and County of San Francisco, on the 5th day of September, 1913, a copy of which said order is hereto attached, marked Exhibit "B," and made a part hereof.

VI.

That said last mentioned order was made and based solely and exclusively upon a certain *subpoena duces tecum* hereinafter referred to and upon two certain presentments or reports made by the Grand Jury of the United States within and for said Northern District of California. The first of said presentments or reports, a copy of which is hereto attached, marked Exhibit "C" and made a part hereof, was and is in writing and was made to and filed in said District Court of the United States in and for the said Northern District of California, First Division, on the 14th day of August, 1913. On this presentment or report a citation, a copy of which is also hereto attached, marked Exhibit "D," and made a part hereof, was issued out of and under the seal of said Court by the

Clerk thereof, and served upon your petitioner on the 16th day of August, 1913. After a hearing upon this citation, a copy of the record whereof is hereto attached, marked Exhibit "L," and made a part hereof, said District Court made and caused to be entered its certain order on the 3d day of September, 1913, requiring your petitioner to produce before said Grand Jury the books, papers and other documents mentioned in said *subpoena duces tecum*, a copy of which order is hereto attached, marked Exhibit "E," and made a part hereof. [3]

VII.

That after the hearing last aforesaid, and after your petitioner had further declined to produce before said Grand Jury the said books, papers and other documents referred to in said *subpoena duces tecum*, and after said Grand Jury had made orally a further presentment or report to said District Court on the said 5th day of September, 1913, stating that your petitioner had further declined to produce before said Grand Jury any of these books, papers or other documents, a further order was made by said District Court and served upon your petitioner upon the said 5th day of September, 1913, citing him to show cause on said day why he should not be adjudged guilty of contempt of said Court therefor, a copy of which order is attached hereto, marked Exhibit "F," and made a part hereof. Upon the hearing of the order last mentioned it was stipulated and agreed by and between counsel for the United States and for your petitioner that all of the records hereof and all of the proceedings, including the evidence and

stipulations as to evidence, heretofore had, taken and entered into herein (which said evidence and stipulations with reference thereto are hereinbefore referred to as Exhibit "L"), should be and the same were admitted in and deemed as evidence upon behalf of your petitioner upon said hearing. Thereupon, after arguments of counsel, said District Court made and caused to be entered its order hereinbefore referred to as Exhibit "B," adjudging your petitioner to be in contempt of said Court and directing his imprisonment in the County jail of Alameda County as in said order provided.

VIII.

That the only subpoena, or *subpoena duces tecum*, under [4] which your petitioner appeared before said Grand Jury, and pursuant to which he was interrogated before said Grand Jury, and which is referred to in said presentments or reports of said Grand Jury, was one issued by and under the seal of the Clerk of said District Court of the United States in and for said Northern District of California, Division No. 1, and served upon your petitioner at or about eleven o'clock in the forenoon of the 14th day of August, 1913, a copy of which said subpoena is hereto annexed, marked Exhibit "G," and made a part hereof.

IX.

That theretofore three certain indictments had been presented to said District Court of the United States in and for said Northern District of California, First Division, by the United States Grand Jury then sitting therein, against John L. Howard,

James B. Smith, J. L. Schmitt, Robert Bruce, Sidney V. Smith, F. C. Mills, E. H. Mayer and Edward J. Smith all of whom are and were officers or employees, respectively, of said Western Fuel Company, two of said indictments having been presented to and filed in said Court in the November, 1912, term of said Court; the other one of said indictments having been presented to and filed in said Court during the March, 1913, term of said Court, copies of which said indictments are hereto annexed marked Exhibits "H," "I" and "K," respectively, and made a part hereof.

That the trial of the defendants therein named, and each of them, under one of said indictments, had been heretofore set for hearing in and by said Court, and thereafter respectively postponed from time to time, and the trial of said defendants, and each of them had been on said 14th day of August, 1913, and at the time your petitioner attended before said Grand Jury as a witness [5] as aforesaid, set for hearing on the 26th day of August, 1913, but at the time last aforesaid, said trial was further postponed until the 13th day of October, 1913.

X.

That at all the times herein mentioned after said indictments had been presented and filed, and particularly on the said 14th day of August, 1913, and thereafter, there was pending before said Grand Jury no cause, proceeding or investigation whatsoever either upon its own initiation or upon presentment to it by or on behalf of the United States, against any person, firm, association or corporation whatsoever, wherein the books, papers and other

documents, or any of them, mentioned in said *subpoena duces tecum* were relevant or material or in any manner connected or to which they in any manner referred; nor was there at any of such times any cause, proceeding or investigation whatsoever pending before said Grand Jury in any manner relating to the importation or sale of coal at the port of San Francisco, or elsewhere, or involving the perpetration of alleged fraud against the United States in connection therewith, or against these defendants or any of them.

XI.

That the said *subpoena duces tecum* hereinbefore set forth, as aforesaid, was so served upon your petitioner as aforesaid, and he was thereby requested to produce the books, papers and other documents therein mentioned merely for the purpose of enabling the United States and the prosecuting officers thereof, to go on a fishing expedition, and, by the use of said Grand Jury in the manner hereinabove stated, to obtain said books, papers and documents solely for the purpose of enabling said United States to obtain evidence at the trial of the case hereinbefore mentioned in paragraph IX hereof, and, if possible, to strengthen said [6] case for the prosecution thereof, and to endeavor, if possible, to find something in said books, papers and documents which might be used by said United States upon said trial, and not otherwise.

XII.

That said Western Fuel Company relies upon and daily uses in the conduct of its business, the books,

papers and other documents mentioned in said *subpoena duces tecum*, and has done so during all of the times herein stated, and its officers and employees who are now under indictment as aforesaid, use and have been for the past several months continuously using said books, papers and other documents in the preparation of their defense in the trial hereinbefore referred to. Furthermore, said books, papers and other documents constitute at least two large dray loads, and are of great bulk and quantity, covering a period of over seven years of great business activity of said Western Fuel Company.

XIII.

That your petitioner's imprisonment, restraint and detention are and each of them is without authority of law whatsoever, and are and is in violation of his rights, privileges and immunities under the constitution and laws of the United States, for the following reasons:

(a) Said District Court of the United States, in and for the Northern District of California, Division No. 1, was without jurisdiction under the said constitution and laws by reason of any of the matters or things contained and set forth in said presentments or reports of the Grand Jury to entertain any charge or charges of contempt against your petitioner, or to act or proceed in any manner in the premises.

(b) At the time your petitioner attended before said Grand Jury and was there examined as a witness, there was no cause [7] or action of any kind whatsoever pending before said Grand Jury between

the United States and said Western Fuel Company, or any of its officers, agents or employees, or between the United States and any other persons, parties or corporations, nor was there any cause or proceeding or investigation whatsoever then pending before said Grand Jury either upon its own initiation or upon presentment to it by or on behalf of the United States against any person, firm, association or corporation whatsoever in which cause, proceeding, or investigation your petitioner could be required under the said constitution and laws to testify or give evidence or produce any books, papers, documents or other things whatsoever before said Grand Jury, or in which said books, papers, documents and other things, or any of them, or any testimony which your petitioner could give, were or was material or relevant whatsoever.

(c) Said Grand Jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation set out in said presentments or reports, the powers of the Federal Grand Jury being limited under said constitution to the investigation either of specific charges against particular persons, or specific charges against persons then unknown, or charges against specific persons, and which said charges and persons, or charges or persons, respectively, are then and there under investigation by said Grand Jury, and there being under investigation by said Grand Jury at the time your petitioner attended before them as aforesaid, no specific or other charge against any particular person, and no specific or other charge against any person then unknown to

said Grand Jury, and no charge against any specific or other person, and there being then and there no presentment, indictment, or other charge, formal or informal, written or oral, pending [8] against any person, firm, association, or corporation before said Grand Jury either initiated by said Grand Jury of its own knowledge, or upon information obtained by it, or upon the knowledge or information obtained by any of its members, or instituted by the United States, or by anyone acting upon its behalf. Nor at such time did it appear to said Grand Jury that there was reason to believe that a crime had been committed for which said Grand Jury had not presented an indictment against any and all persons alleged to have committed said crime, or to have been connected therewith; and consequently said *subpoena duces tecum* and the requirement of said Grand Jury that your petitioner should appear before it and testify and produce documentary evidence, and said presentments, citation and orders based thereon were *coram non judice* and void.

(d) Your petitioner, at the time he attended before said Grand Jury and was examined as aforesaid, was not apprised of the name or names of any party with respect to whom he was being called to testify and to produce the books, papers and other documents aforesaid, nor was he informed of the nature of the or any charge pending against any person, firm, association or corporation whatsoever, nor was he advised that any cause, proceeding or investigation whatsoever was pending before said Grand Jury at such time against any party whatsoever; but, on

the contrary, petitioner alleges that he and his counsel were informed by officers of the Government, including the special agent of the Treasury Department, who was then in charge of the collection and acquisition of evidence in the case hereinbefore referred to, and by special counsel employed by the United States to prosecute said case, and your petitioner thereupon verily believed and believes that at the time of your petitioner's appearance as witness before said Grand Jury as aforesaid, there was no charge, cause, proceeding or investigation of any kind or nature whatsoever then pending before said Grand [9] Jury against any person, firm, association or corporation whatsoever.

(e) The subpoena under which your petitioner has been adjudged in contempt, a copy of which is hereinbefore set forth, does not specify that any charge, cause, action or proceeding was pending before said Grand Jury, and does not in any manner apprise your petitioner that there was any such charge, cause, action or proceeding pending before said Grand Jury either of any character whatever, or against any person, firm, association or corporation whatsoever.

(f) There was no order made by, nor application for any orders made to, any judge of said District Court, or other Judge, nor was there any other order or application therefor providing or requesting the issuance of said or any *subpoena duces tecum*, and the *subpoena duces tecum*, a copy of which is hereinbefore set forth, was issued by the clerk of said United States District Court in and for the Northern

District of California, Division No. 1, without any order or direction of any judge whatsoever, nor was there any showing made, either to any Judge or to said clerk, that the papers, books and documents, or any of them, described in said *subpoena duces tecum* were material and relevant, or material or relevant to any matter, cause or proceeding before said Grand Jury whatsoever.

(g) The said *subpoena duces tecum* and said presentments, citation and order directing your petitioner to produce the books, papers and documents called for by said *subpoena duces tecum*, or otherwise suffer punishment, and said order adjudging your petitioner in contempt, and all other process and proceedings heretofore served and had herein, were, and each of them was, made and had in violation of your petitioner's right under the fourth amendment to the constitution of the United States providing that the right of the people to be secure in their person, houses, papers and books against unreasonable searches and seizures shall not be violated.

(h) The said *subpoena duces tecum* and said presentments, [10] citation and orders directing your petitioner to produce the books, papers and documents called for by *subpoena duces tecum*, or otherwise suffer punishment, and said order adjudging your petitioner in contempt, and said commitment, were, and each of them was, and is, in effect a warrant and search for and seizure of the papers mentioned in said *subpoena duces tecum*, and not being issued upon probable cause, or supported by oath or affirmation, and failing to particularly describe

the place to be searched or the things to be seized, constituted and constitute a violation of said fourth amendment.

(i) The said *subpoena duces tecum* and said presentments, citation and orders directing your petitioner to produce the books, papers and documents called for by *subpoena duces tecum*, or otherwise suffer punishment, and said order adjudging your petitioner in contempt, and commitment issued thereunder, constituted and constitute a violation of said fourth amendment to said constitution by reason of the failure to particularly describe the books, papers and documents sought to be produced, and by reason of the fact that they are needed daily by said Western Fuel Company in the conduct of its business, and are so numerous as to make it difficult to carry the same to the room of said Grand Jury, and by reason of the fact that their presence before said Grand Jury will embarrass said defendants, and each of them, in the preparation of their defense on the trial of said cause, who require said books, papers and other documents for the purpose of obtaining information necessary to properly meet the charges against them contained in said indictments and in said cause now set for trial.

(j) The books, papers and other documents mentioned in said *subpoena duces tecum* being the property of said Western Fuel Company, and in your petitioner's custody solely by reason of his official relation toward that company, as aforesaid, the compulsion of said subpoena and of said orders that he produce said books, papers and other documents thereunder, would, if effective, amount to an unrea-

sonable search for and seizure of the papers and books [11] of said corporation in violation of its rights under said fourth amendment, which it was your petitioner's duty, as such officer and custodian, to protect by lawful means, as he respectfully submits he is now doing.

(k) The production of said books, papers and other documents being required of your petitioner in his capacity as an officer of said corporation, and said citation, *subpoena duces tecum* and orders so requiring it not being issued upon probable cause, or supported by oath or affirmation, and failing to particularly describe the place to be searched, or the things to be seized, constitutes a violation of said fourth amendment; consequently, not only was your petitioner under no immediate obligation to enforce or obey the same, but his duty as such officer required him to disregard it.

XIV.

Your petitioner is advised by counsel, and verily believes, that for the reasons above stated said order adjudging him guilty of contempt and his commitment, pursuant to such order, to the custody of said marshal, were, and each of them was, without legal right, authority or justification of any kind and are, and each of them is, utterly void and ineffectual, and that his detention and imprisonment thereunder are in violation of said constitution and the laws of the United States, and in violation of his rights, privileges and immunities thereunder.

WHEREFORE, your petitioner prays that a writ of *habeas corpus* may issue directed to said C. T.

Elliott, Esq., Marshal, as aforesaid, or to any of his deputies, requiring him, or them to bring and have your petitioner before this Court at a time to be by it determined together with the true cause of his detention, to the end that due inquiry may be had in the premises; and that, furthermore, this Court may proceed in a summary way to determine the facts of the case in that regard, and the legality of your petitioner's imprisonment, restraint and detention, [12] and thereupon to dispose of your petitioner as law and justice may require.

And your petitioner will ever pray.

Dated at San Francisco, California, the tenth day of September, 1913.

SAMUEL KNIGHT,
STANLEY MOORE,

Attorneys for Petitioner. [13]

United States of America,
State and Northern District of California,—ss.

David C. Norcross, being first duly sworn, deposes and says:

That he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters that are therein stated on information or belief, and that as to those matters he believes it to be true.

DAVID C. NORCROSS.

Subscribed and sworn to before me this 10th day of September, 1913.

[Seal]

W. B. MALING,
Clerk of U. S. District Court, Northern District of California. [14]

**Exhibit "A" [Commitment of D. C. Norcross to
County Jail].**

United States of America,
Northern District of California,—ss.

The President of the United States of America, To
the Marshal of the United States of America,
for the Northern District of California, Greeting:

Whereas, at the July Term of the District Court of the United States of America for the Northern District of California, held at the courtroom of said court, in the City and County of San Francisco, in said District, to wit, on the 5th day of September, A. D. 1913.

D. C. Norcross was adjudged guilty of contempt of Court, in failing to obey a subpoena issued out of this Court on August 14th, 1913, and for failure to obey an order of this Court, dated September 3d, 1913, committed at

and within the jurisdiction of said Court, contrary to the form of the Statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

And whereas, on the 5th day of September, A. D. 1913, being a day in said term of said Court, said D. C. NORCROSS was, for the offense of which he stood convicted as aforesaid, by the judgment of

said Court ordered imprisoned in the County Jail of Alameda County, State of California, until he obeys said subpoena and said Order of Court.

And it was further ordered that said term of imprisonment be executed upon the said D. C. NORCROSS until the other or further order of the Court, by imprisonment in the County Jail of Alameda County, State of California. [15]

Now this is to Command you, the said Marshal, to take and keep and safely deliver the said D. C. NORCROSS into the custody of the Keeper or Warden and other officers in charge of the said Alameda County Jail.

And this is to command you, the said Keeper or Warden and other officers in charge of said Alameda County Jail, to receive from the Marshal of the United States, for the said Northern District of California, the said D. C. NORCROSS, convicted and sentenced as aforesaid, and him the said D. C. NORCROSS keep and imprison until he obeys said subpoena and Order, or until the other or further Order of the Court.

HEREIN FAIL NOT.

Witness, the Honorable M. T. DOOLING, Judge of the District Court of the United States for the Northern District of California, and the Seal thereof, at San Francisco, in said District on the 5th day of September, A. D. 1913.

[Seal]

W. B. MALING,
Clerk of said District Court.

By Lyle S. Morris,
Deputy Clerk.

NOTE—The Court this day Ordered a stay of the execution of the foregoing Commitment until 12 o'clock noon of the 10th day of September, A. D. 1913.

Attest: September 5th, 1913.

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of the Original Commitment issued in the case of The United States vs. D. C. Norcross.

Attest: my hand and the Seal of said District Court, this 10th day of September.

W. B. MALING,
Clerk.

By _____,
Deputy Clerk. [16]

Exhibit "B" [Judgment].

UNITED STATES OF AMERICA, NORTHERN
DISTRICT OF CALIFORNIA.

*In the District Court of the United States, for the
Northern District of California.*

In the Matter of the Presentment Heretofore Returned by the Grand Jury Against D. C. NORCROSS as Secretary of the WESTERN FUEL COMPANY, a Corporation, for Contempt of the Above-entitled Court.

It appearing to the Court that on the 14th day of August, 1913, a *subpoena duces tecum* in proper form was duly issued out of and under the seal of the above-entitled court, directed to D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, requiring and commanding said D. C. Norcross as Secretary of the Western Fuel Company, a corporation, to appear before the Grand Jury of the United States of America within and for the Northern District of California at a session of said Grand Jury to be held in the United States Courthouse situate in the Postoffice Building in the City and County of San Francisco, State of California, on the 14th day of August, 1913, at two o'clock in the afternoon of said day, and requiring said D. C. Norcross as Secretary of the Western Fuel Company at said time and place to produce certain books, papers, records, vouchers and documents specifically described [17] in said subpoena; that thereafter and on the said 14th day of August, 1913, at said City and County of San Francisco, in said State and Northern District of California, said subpoena was duly served upon said D. C. Norcross as Secretary of the Western Fuel Company, a corporation, by a Deputy United States Marshal in and for the Northern District of California by said Deputy United States Marshal then and there delivering to and leaving with D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, a true and correct copy of said *subpoena duces tecum* and at the same time showing him the original thereof; that thereafter and at the time and place designated in

said subpoena, to wit, at two o'clock in the afternoon of said 14th day of August, 1913, in said Post-office Building, in said City and County of San Francisco, State of California, and in pursuance of said subpoena, said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, appeared before said Grand Jury and was then and there being duly held by said Grand Jury and was then and there duly sworn by the foreman of said Grand Jury to testify as a witness in an investigation then being pursued by said Grand Jury concerning certain frauds alleged to have been perpetrated against the United States; that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, refused to produce before said Grand Jury at said time and place and during said session or during any other session of said Grand Jury any of the books, papers, records, vouchers or documents described or referred to in said subpoena; and during said session of said Grand Jury said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, informed said Grand Jury and the members thereof that he would not, in obedience to said subpoena, produce said books, papers, records, vouchers and documents or any of them; and it further appearing to the Court that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, at all of [18] said times had and still has possession, custody and control of all of said books, papers, records, vouchers and documents referred to and described in said subpoena, excepting certain of said records in ex-

istence prior to the 18th day of April, 1906, and destroyed on said date, and that he refuses to and will not produce before said Grand Jury at any session to be held thereof, in obedience to said subpoena so duly served upon him or any other subpoena, said books, papers, records, vouchers and documents, or any of them; and it further appearing to the Court that on the 14th day of August, 1913, said Grand Jury returned into this court and filed with the clerk thereof a presentment against said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, in which the facts above set forth were found by said Grand Jury, and said Grand Jury requested that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, be brought before this Court and be dealt with according to law; that upon the return and filing of said presentment the above-entitled Court duly gave and made its order directing said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, to show cause before the First Division of the District Court of the United States for the Northern District of California at a session to be held in the courtroom of said court in said Postoffice Building in the City and County of San Francisco, State of California, on Monday, the 18th day of August, 1913, at the hour of ten o'clock A. M. of said day, why he should not be adjudged guilty of contempt of this Court and punished for said contempt in refusing said subpoena and to produce before said Grand Jury said books, papers, records, vouchers and documents or any of them, so in his possession and under his con-

trol; that on said 18th day of August, 1913, at the time and place specified in said order said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, appeared before this Court in response to said presentment and order of said Court; and that [19] at said time and place a hearing was had upon said presentment and said order evidence was introduced in relation thereto, and the said proceedings was submitted to the Court for its consideration and decision.

And it further appearing to the Court that on the 3d day of September, 1913, the above-entitled Court in the above-entitled proceedings duly gave and made its order directing said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, to produce before said Grand Jury at a session to be held of said Grand Jury at two o'clock P. M. on the 4th day of September, 1913, in said Postoffice Building in the said City and County of San Francisco, State of California, said books, papers, records, vouchers and documents described and referred to in said subpoena and so in his possession and under his control; that thereafter and on said 3d day of September, 1913, a true and correct copy of said order, duly certified by the clerk of the above-entitled court was duly served by the United States Marshal in and for the Northern District of California upon said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, by said United States Marshal then and there delivering to and leaving with said D. C. Norcross, as the Secretary of said Western Fuel Company, a corporation,

said true and correct copy of said order.

And it further appearing to the Court that a session of said Grand Jury of the United States of America within and for the Northern District of California was duly held in said Postoffice Building at said City and County of San Francisco, State of California, at two o'clock P. M. on said 4th day of September, 1913, said session so being held at the time and place specified in said order, and that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, failed, neglected and refused to appear before said Grand Jury at said session or to produce said books, [20] papers, records, vouchers and documents or any of them so in his possession and under his control.

And it further appearing to the Court that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, although at all of said times having ability so to do, willfully and contumaciously refused and still refuses to obey said subpoena or said order of this court or to produce before said Grand Jury said books, papers, records, vouchers and documents or any of them so within his possession or under his control.

NOW, THEREFORE, by reason of the premises aforesaid, it is hereby ordered, adjudged and decreed that said D. C. Norcross as Secretary of said Western Fuel Company, a corporation, is and he is hereby adjudged to be, in contempt of the District Court of the United States for the Northern District of California.

It is further ordered, adjudged and decreed, as

punishment for said contempt, that said D. C. Norcross be, and he is hereby ordered imprisoned in the County Jail of Alameda County, State of California, until he obeys said subpoena and said order of said Court, aforesaid, and produces before said Grand Jury said books, papers, records, vouchers and documents so in his possession and under his control as Secretary of said Western Fuel Company, a corporation.

It is further ordered, adjudged and decreed that a writ of commitment forthwith issue from this court directed to the Marshal of the United States of America for the Northern District of California commanding and requiring said Marshal to take and keep and safely deliver the said D. C. Norcross into the custody of the keeper or warden and other officers in charge of said Alameda County Jail, to be there kept and imprisoned until he obeys said subpoena and order aforesaid. [21]

Let execution issue forthwith.

Done in open court this 5th day of September, 1913.

M. T. DOOLING,

Judge of the District Court of the United States for
the Northern District of California, First
Division.

[Endorsed]: Filed Sep. 5, 1913. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [22]

**Exhibit "C" [Presentment by Grand Jury Against
D. C. Norcross].**

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

At a stated term of said court, begun and holden in the City and County of San Francisco, within and for the State and Northern District of California, on the first Monday of July in the year of our Lord One Thousand Nine Hundred and Thirteen;

The Grand Jurors of the United States of America within and for the State and District aforesaid, on their oaths, present and return to said court the following presentment against D. C. Norcross, as Secretary of the Western Fuel Company, a corporation:

That heretofore, to wit, on the 14th day of August, 1913, a subpoena was duly issued out of and under the seal of the above-entitled court, directed to said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, a true and correct copy of which subpoena is hereunto annexed, hereby referred to, marked Exhibit "A" and hereby made a part hereof; that thereafter and on said 14th day of August, 1913, at the City and County of San Francisco, in said State and Northern District of California, said subpoena was duly served upon said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, by a Deputy United States Marshal in and for the said Northern District of

[23] California, by said Deputy United States Marshal then and there delivering to and leaving with D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, a true and correct copy of said subpoena, and at the same time showing him the original thereof.

That thereafter, and at the time and place designated in said subpoena, to wit, 2 o'clock P. M. on said 14th day of August, 1913, in the Postoffice building in the City and County of San Francisco, State of California, and in pursuance of said subpoena, said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, appeared before said Grand Jury at a session then being duly held by said Grand Jury, and was then and there duly sworn by the foreman of said Grand Jury to testify as a witness in an investigation then being pursued by said Grand Jury concerning certain frauds alleged to have been perpetrated and committed by said Western Fuel Company against the United States.

That said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, refused to produce before said Grand Jury any of the books, papers or documents described and referred to in said subpoena, and during said session of said Grand Jury said D. C. Norcross, as Secretary of said corporation, informed said Grand Jury that he, as Secretary of said corporation, would not, in obedience to said subpoena, produce said books, papers and documents, or any of them.

That said D. C. Norcross, as such Secretary, here-

tofore testified before said Grand Jury that he was, and [24] had been for many years, the Secretary of said Western Fuel Company, a corporation, and that as such Secretary he had and still had the possession, custody and control of all of said papers, records and documents referred to in said subpoena, excepting certain of said records destroyed in the fire of April 18th, 1906, and that he would not produce before said Grand Jury, in obedience to any subpoena served upon him, said books, records, or papers, or any of them.

WHEREFORE said Grand Jury returns this presentment against said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, so that said D. C. Norcross, as Secretary of said corporation, may be brought before this Honorable Court and dealt with according to law.

Dated: August 14, 1913.

JOHN R. HANIFY,

Foreman of the Grand Jury.

MATT I. SULLIVAN,

THEO. J. ROCHE,

Assistants to the Attorney General of the United States.

BENJ. L. McKINLEY,

U. S. Attorney. [25]

[Endorsed]: Presented in open court and filed Aug. 14, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [26]

Exhibit "D" [Citation to D. C. Norcross to Show Cause].

**UNITED STATES OF AMERICA, NORTHERN
DISTRICT OF CALIFORNIA.**

*In the District Court of the United States for the
Northern District of California.*

In the Matter of the Presentment Heretofore Returned by the Grand Jury Against D. C. NORCROSS, as Secretary of the WESTERN FUEL COMPANY, a Corporation, for Contempt of the Above-entitled Court.

It appearing to the above-entitled court that on the 14th day of August, 1913, a subpoena was duly issued out of and under the seal of the above-entitled court, directed to D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, requiring and commanding said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, to appear before the Grand Jury of the United States of America, within and for the Northern District of California, at a district court to be held in the United States courthouse in the Postoffice Building, in the City and County of San Francisco, [27] on the 14th day of August, 1913, at 2 o'clock in the afternoon, and that at said time and place he produce certain books, papers, records, vouchers and documents specifically described in said subpoena; that thereafter and on the 14th day of August, 1913, at the City and County of San Francisco, in said State and Northern District of California, said sub-

poena was duly served upon said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, by a deputy United States marshal in and for the Northern District of California, by said deputy United States marshal then and there delivering to and leaving with said D. C. Norcross, as such secretary of said corporation, a true and correct copy of said subpoena, and at the same time showing him the original thereof; that thereafter, and at the time and place designated in said subpoena, to wit at 2 o'clock in the afternoon of said 14th day of August, 1913, in the Postoffice Building in the City and County of San Francisco, State of California, and in pursuance of said subpoena, said D. C. Norcross appeared before said Grand Jury, at a session then being duly held by said Grand Jury, and was then and there duly sworn by the foreman of said Grand Jury to testify as a witness in an investigation then being pursued by said Grand Jury concerning certain frauds alleged to have been perpetrated and committed by said Western Fuel Company against the United States; that said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, refused to produce before said Grand Jury any of the books, papers, records, vouchers or documents described or referred to in said subpoena, and during said session of said Grand Jury said D. C. Norcross, as Secretary of said corporation, [28] informed said Grand Jury that neither said Western Fuel Company, a corporation, nor said D. C. Norcross, as secretary thereof, would in obedience to said subpoena, produce said books, papers, records,

vouchers and documents, or any of them ;

And it further appearing to the Court that said D. C. Norcross, as such Secretary, had and still has possession, custody and control of all of said books, papers, records, vouchers, and documents referred to in said subpoena, excepting certain of said records in existence prior to the 18th day of April, 1906, and destroyed on said date, and that he would not produce before said Grand Jury, in obedience to said, or any, subpoena served upon him, said books, papers, records, vouchers and documents, or any of them ;

And it further appearing to the Court that on the 14th day of August, 1913, said Grand Jury returned into this Court and filed with the Clerk thereof a presentment against said D. C. Norcross, as such Secretary, in which the facts above set forth were found by said Grand Jury, and said Grand Jury requested that said D. C. Norcross, as such Secretary, be brought before this Court and dealt with according to law ;

And the Court having ordered that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, show cause before the First Division of the District Court of the United States, for the Northern District of California, at a session to be held in the courtroom of said Court, in the Post-office Building, in the City and County of San Francisco, on Monday, the 18th day of August, 1913, at 10 o'clock [29] A. M., why he should not be adjudged guilty of contempt of this Court and punished for said contempt, in failing, refusing and

neglecting to obey said subpoena and to produce before said Grand Jury said books, papers, records, vouchers and documents in his possession or under his control as Secretary of said Western Fuel Company, a corporation;

NOW, THEREFORE, you, said D. C. Norcross, are hereby commanded to be and appear before said First Division of the District Court of the United States, for the Northern District of California, at a session to be held in the courtroom of said Court, in the Postoffice Building, in the City and County of San Francisco, on Monday, the 18th day of August, 1913, at 10 o'clock A. M., then and there to show cause, if any you have, why you should not be adjudged guilty of contempt of this Court and punished therefor, in failing, refusing and neglecting to obey said subpoena and produce before said Grand Jury said books, papers, records, vouchers and documents, in your possession or under your control as such Secretary of said Western Fuel Company, a corporation.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of said District Court for the Northern District of California, this 16th day of August, in the year of our Lord one thousand and nine hundred and thirteen.

[Seal]

W. B. MALING,
Clerk.

By Francis Krull.
Deputy Clerk.

A true copy. Attest:

W. B. MALING,
Clerk.

By Francis Krull,
Deputy Clerk. [30]

**Exhibit "E" [Order Requiring D. C. Norcross to
Produce Certain Books, etc., Before Grand
Jury].**

*In the District Court of the United States, in and for
the Northern District of California.*

In the Matter of the Presentment Returned by the
Grand Jury of the United States of America,
Within and for the State and Northern Dis-
trict of California, Against D. C. NOR-
CROSS, as Secretary of the WESTERN
FUEL COMPANY, a Corporation.

The Grand Jury of the United States of Amer-
ica, within and for the State and Northern District
of California, having heretofore presented and re-
turned to the above-entitled court a presentment
against D. C. Norcross, as Secretary of the Western
Fuel Company, a corporation, for having refused to
produce before said Grand Jury certain books, pa-
pers and documents described and referred to in
that certain *subpoena duces tecum*, issued out of and
under the seal of the above-entitled court on the 14th
day of August, 1913, directed to said D. C. Norcross
as Secretary of the Western Fuel Company, a cor-
poration, requiring him [31] as such Secretary,
to produce said books, papers and documents before

said Grand Jury, at a session thereof held on said 14th day of August, 1913, at the place referred to in said subpoena, a copy of which subpoena is attached to and made a part of said presentment; and thereafter, and on the 18th day of August, 1913, said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, having appeared before the above-entitled court in response to said presentment, to show cause, if any he had, why he should not be punished for a contempt of said Court in having failed and refused to obey said subpoena and to produce before said Grand Jury at said time and place designated in said subpoena, said books, papers and documents, or any of them;

NOW, THEREFORE, in order to enable said D. C. Norcross, as such secretary of said Western Fuel Company, a corporation, to obey said subpoena and comply with the terms and requirements thereof and to produce before said Grand Jury said books, papers and documents referred to and described in said subpoena, IT IS HEREBY ORDERED, that said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, produce before said Grand Jury, at a session thereof to be held on Thursday, the 4th day of September, 1913, at 2 o'clock P. M. of said day, all of said books, papers and documents described and referred to in said subpoena.

Dated: September 3d, 1913.

M. T. DOOLING,
Judge.

[Seal] A true copy. Attest:

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

[Endorsed]: Filed Sep. 3, 1913. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [32]

**Exhibit "F" [Citation Requiring Western Fuel Co.
to Show Cause].**

UNITED STATES OF AMERICA, NORTHERN
DISTRICT OF CALIFORNIA.

*In the District Court of the United States, for the
Northern District of California.*

In the Matter of the Presentment Returned by the
Grand Jury of the United States of America,
Within and for the State and Northern Dis-
trict of California, Against WESTERN
FUEL COMPANY, a Corporation.

Northern District of California,—ss.

The President of the United States of America, to
Western Fuel Company, a Corporation.

You are hereby required to be and appear before
the First Division of the District Court of the
United States in and for the Northern District of
California, at its Courtroom, situated in the United
States Postoffice Building, located in the City and
County of San Francisco, State of California, on

Friday the 5th day of September, 1913, at 4:30 o'clock P. M., on said day then and there to show cause, if any you have why you should not be adjudged guilty of contempt of this Court, and punished for said contempt, in failing, refusing and neglecting to produce before the grand jury of the United States of America, in and for the Northern District of California, at the session held by said grand jury, certain books, papers, records, vouchers and documents, described in a certain subpoena issued out of this court on the 14th day of August, 1913, requiring you to produce before said [33] grand jury the said books, papers, documents, records and vouchers, which subpoena was heretofore served upon you; also disobeying the order heretofore made by this Court, directing production before said grand jury of said books, papers, documents and vouchers.

Witness, the Honorable M. T. DOOLING, Judge of said court, this 5th day of September, in the year of our Lord, one thousand nine hundred and thirteen, and of our independence the one hundred and thirty-eighth.

W. B. MALING,
Clerk.

By _____,
Deputy Clerk.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of Citation directed to Western Fuel Company, a corporation, to show cause why it

should not be punished for contempt of Court, as the same was issued.

Attest my hand and the seal of said District Court,
this 5th day of September, A. D. 1913.

[Seal]

WALTER B. MALING,
Clerk. [34]

[Affidavit of W. H. Tidwell.]

UNITED STATES OF AMERICA, NORTHERN
DISTRICT OF CALIFORNIA.

*In the District Court of the United States for the
Northern District of California.*

In the Matter of the Presentment Returned by the
Grand Jury of the United States of America,
Within and for the State and Northern Dis-
trict of California, Against D. C. NOR-
CROSS, as Secretary of the WESTERN
FUEL COMPANY, a Corporation.

United States of America,
Northern District of California,—ss.

W. H. Tidwell, having been first duly sworn, de-
poses and says:

On the 14th day of August, 1913, the Grand Jury
of the United States of America, within and for the
Northern District of California, duly returned into
this court and filed with the clerk thereof a present-
ment against D. C. Norcross, as Secretary of the
Western Fuel Company, a corporation, for refusing
to produce before said Grand Jury certain books,
papers, records, vouchers and documents specifi-
cally described [35] and referred to in a certain

subpoena duly issued out of and under the seal of this court on the 14th day of August, 1913, directed to said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, to appear before said Grand Jury of the United States of America, within and for the Northern District of California, at a session to be held in the United States courthouse in the Postoffice Building, in the City and County of San Francisco on the 14th day of August, 1913, at 2 o'clock in the afternoon of said day, and at said time and place to produce said books, papers, records, vouchers and documents;

Upon the return and filing of said presentment, this Court gave and made its order directing that said D. C. Norcross, as such Secretary, show cause before the First Division of the District Court of the United States, for the Northern District of California, at a session to be held in the courtroom of said court, in the Postoffice Building, in the City and County of San Francisco, State of California, on Monday, the 18th day of August, 1913, at the hour of 10 o'clock A. M. of said day, why he should not be adjudged guilty for contempt of this court, and punished for such contempt, in refusing to obey said subpoena, and to produce before said Grand Jury said books, papers, records, vouchers and documents in his possession and under his control as such Secretary.

On said 18th day of August, 1913, at the time and place specified in said order, said D. C. Norcross, as such Secretary of said Western Fuel Company, appeared before said court in response to said pre-

sentment and said order of said court; [36]

At said time and place a hearing was had upon said presentment and said order, evidence was introduced, and the matter was submitted to the Court for its consideration and decision.

Thereafter, and on the 3d day of September, 1913, the above-entitled court, in the above-entitled proceeding, duly gave and made its order directing said D. C. Norcross, as such Secretary of said Western Fuel Company, to produce before said Grand Jury, at a session thereof to be duly held by said Grand Jury at 2 o'clock P. M. on the 4th day of September, 1913, in the courtroom of said court, in the Postoffice Building, in the City and County of San Francisco, said books, papers, vouchers and documents described and referred to in said subpoena, in his possession and under his control as such Secretary.

Thereafter, and on said 3d day of September, 1913, a true and correct copy of said order, duly certified by the Clerk of said court, was duly served by the United States Marshal in and for the Northern District of California upon said D. C. Norcross as such Secretary of said Western Fuel Company, a corporation;

Said Grand Jury of the United States of America, within and for the Northern District of California, duly held a session at 2 o'clock P. M. on said 4th day of September, 1913, at said place specified in said order;

Said D. C. Norcross, as such Secretary, failed, neglected and refused to appear before said Grand Jury at said session, or to produce said books, papers,

vouchers or documents, or any of them; [37]

Affiant hereby refers to said presentment, and said orders, so made by said court, as though each of the same were herein specifically set forth.

WHEREFORE, affiant prays that said D. C. Norcross be adjudged guilty of contempt of this court, and punished therefor, for failing, refusing and neglecting to obey said subpoena, and said order of said court last referred to, and to produce before said Grand Jury said books, papers, records, vouchers and documents in his possession, or under his control, as such Secretary.

W. H. TIDWELL.

Subscribed and sworn to before me this 5th day of September, 1913.

[Seal]

W. B. MALING,

Clerk United States District Court in and for the Northern District of California. [38]

[Subpoena Duces Tecum to D. C. Norcross.]

UNITED STATES OF AMERICA, NORTHERN DISTRICT OF CALIFORNIA.

In the District Court of the United States for the Northern District of California.

The President of the United States of America, to D. C. Norcross, as Secretary of the Western Fuel Company, a Corporation, Greeting:

WE COMMAND YOU, that all business and excuses being laid aside, you appear before the Grand Jury of the United States of America, within and

for the Northern District of California, at a district court to be held in the United States courthouse, in the Postoffice Building, in the City and County of San Francisco, on the 14th day of August, 1913, at 2 o'clock in the afternoon, and that you produce before the said Grand Jury at the time and place aforesaid, the following:

All books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company situate on Folsom Street Dock in the City and County of San Francisco on the 1st day of January, 1904, including [39] the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker, and also showing the amount and weight of coal on the 1st day of January, 1904, in the coal yard of said Western Fuel Company connected with said bunker by a tramway and situate on East Street, in said City and County of San Francisco; and also showing the amount and weight of all coal in all other bunkers and places containing, or which contained coal of the Western Fuel Company on the 1st day of January, 1904, in the State of California.

Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker and delivered from said yard, between the

1st day of January, 1904, and the date hereof.

Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the amount and weight of coal on this date in said bunker of said Western Fuel Company, including said off-shore and said in-shore bunker, and in said yard.

Also all books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company, situate on said Folsom Street Dock, on the 1st day of May, 1906, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker; and also showing the amount and weight of coal on the 1st day of May, 1906, in said coal-yard of said Western Fuel Company, and also showing the amount and weight of all coal in all other bunkers and places in the State of California containing or which contained coal of the Western Fuel Company on the 1st day of May, 1906.

Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker, and delivered from said yard, between the 1st day of May, 1906, and the date hereof; also showing all coal delivered from any and all other bunkers and places containing, or which contained coal of the Western Fuel Company between the

1st day of January, 1904, and the date hereof, and also between the 1st day of May, 1906, and the date hereof.

Also all books, papers, records and documents of said Western Fuel Company, a corporation, in your possession or under your control, showing the weight of each load of coal taken from said in-shore and said off-shore bunker and out of said yard, and out of all other bunkers and places containing, or which contained coal of said Western Fuel Company, between the 1st day of January, 1904, and the date hereof; also showing the name of the person or persons to whom each of said loads of coal was sold or delivered, the date or dates upon which each of said loads of coal was so sold or delivered, and the amount charged to the person or persons to whom each of said loads of coal was so sold or [40] delivered, and the amount paid for each of said loads of coal so sold or delivered.

Also all weekly, monthly and yearly financial and other reports made to the Directors of the Western Fuel Company, showing the financial condition of the affairs of said company; also the minute-books of said company containing the minutes of the meetings of the Directors and the minutes of the meetings of the stockholders of said company between the 1st day of January, 1904 and date hereof.

Also all stock ledgers, stock journals and stock certificate books showing the names of the various holders of shares of the capital stock of said West-

ern Fuel Company on the 1st day of January, 1904, and at all times between January 1, 1904, and the date hereof.

Also all ledgers, cash-books and papers showing the expenses incurred and paid out by said Western Fuel Company between the 1st day of January, 1904, and the date hereof, and to whom said payments were made.

Witness, the Honorable WM. C. VAN FLEET, Judge of said District Court for the Northern District of California, this 14th day of August, in the year of our Lord one thousand nine hundred and thirteen.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

M. J. SULLIVAN,
THEO. J. ROCHE,

Assistants to the Attorney General of the
United States.

BENJ. L. McKINLEY,
Acting U. S. Attorney. [41]

Exhibit "H" -[Indictment Against Howard et al.].

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

At a stated term of said Court begun and holden at the City and County of San Francisco, within and for the State and Northern District of California,

on the first Monday of November, in the year of our Lord One thousand nine hundred and twelve.

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: THAT

JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMITT, ROBERT BRUCE, SYDNEY V. SMITH, F. C. MILLS, E. H. MAYER, and EDWARD J. SMITH,

hereinafter called the defendants, whose more full and true names are to the Grand Jurors unknown, heretofore, to wit, on the first day of January, in the year of our Lord one thousand nine hundred and four, in the State and Northern District of California, and within the jurisdiction of this Honorable Court, then and there being, did then and there wilfully, knowingly, unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree together among themselves and with divers other persons

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whose names are to the Grand Jurors aforesaid unknown, and for that reason not herein set forth, to defraud the United States in the manner following, that is to say:

That the said Western Fuel Company was at all the times herein mentioned, a corporation organized, [42] existing and doing business under and by virtue of the laws of the State of California, and was at all of said times engaged in the importation into the United States and the sale of coals for fuel, and in purchasing coals from divers other persons, firms

and corporations so importing coals into the United States for fuel;

That the said defendants and said divers other persons whose names are to said Grand Jurors unknown, did plan, confederate, conspire and agree, under the guise and name of the said corporation, to wit, Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company by itself and through other persons, firms and corporations from divers foreign countries, ports and places for said Western Fuel Company, and to defraud the United States out of a large portion of the duties due to the United States on divers shiploads and cargoes of coal so imported by said Western Fuel Company and other persons, firms and corporations as aforesaid and coming into the Port of San Francisco, by making and causing to be made false weights and false and fraudulent returns of weights of such cargoes and importations of coal, and by further fraudulently weighing and causing to be weighed by themselves and by the Pacific Mail Steamship Company, a corporation, and by other persons and corporations whose names are to the Grand Jurors aforesaid unknown, and for that reason not herein stated, and reported to the United States, the weights of all such importations of coal loaded from the bunkers and barges of said Western Fuel Company for fuel on board vessels [43] propelled by steam, and engaged in trade with foreign countries and in trade between the Atlantic and Pacific ports of the United States, and which ships or vessels were

registered under the laws of the United States; and further to defraud the United States by making, and causing to be made false returns, weights and entries of coal shipped and loaded aboard the transports of the United States Army Service and other Government ships purchasing coal at San Francisco Harbor; and to that end, and for the purpose of carrying out such conspiracy, combination and agreement, to maintain on the docks, wharves and barges owned, operated, controlled and occupied by said Western Fuel Company and by the said defendants at the Port of San Francisco, in the State and Northern District of California, scales and weights which were to be and were fraudulently manipulated by the defendants to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon, and the said defendants did so manipulate said scales and weights and the method of weighing thereon, so that said scales and weights did record the weights of coal desired by said defendants, and not the true weight of the coal so placed thereon; and to further cause fraudulent affidavits and statements to be made by the defendants and by each of them to the officers of the Government of the United States, and to other persons and corporations whose names are to the Grand Jurors aforesaid unknown, and for that reason not herein stated, and to the Pacific Mail Steamship Company, a corporation organized and existing under and by virtue of the laws of the State of New York [44] and engaged in the shipping and transportation of freight and passengers, with

offices located in the City and County of San Francisco, and which operated and still operates American registered vessels engaged in foreign trade and buying coal from said Western Fuel Company for the purpose and to the end that said Pacific Mail Steamship should claim from the United States a greater rebate on the drawback of coal duties permitted where coal is loaded upon American registered vessels engaged in foreign trade than the true weight of said coal would permit said Pacific Mail Steamship Company to claim or was due the said Pacific Mail Steamship Company;

And further to cause all coal weighed in, on or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed to the end and for the purpose that the defendants, acting under the name and guise of said Western Fuel Company aforesaid, should receive the profit and gain to be made by such incorrect and fraudulent weight;

That said conspiracy, combination, confederation, and agreement was continuously in effect and operation and in process of execution by the said defendants and each of them from and including the first day of January in the year of our Lord one thousand nine hundred and four, to and including the twenty-fourth day of February in the year of our Lord one thousand nine hundred and thirteen, and the said conspiracy, combination, confederation and agreement was continuously in operation [45] and in process of execution by said defendants during all of the times mentioned in this indictment, and was

continuously in operation and in process of execution by said defendants and each of them during all the times mentioned in each and every overt act herein-after set forth and alleged in this indictment;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

"Shinyo Maru	389.1337	
Siberia	690.1462	1080.559

Over 60.1759."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the ninth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels the following entry:

"Siberia	810.19		
Andrew Kelly	40.		
G. E. Foster	40	890.19	[46]

Over 20.1299."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the tenth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

"Korea	974.449		
Mathilde	210.145	1184.593	

Over 72.1023."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said defendant, F. C. Mills, did on the fourteenth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the

weight of coal loaded from barges into vessels, the following entry:

“Ex ‘Comanche’ Wellg.

Ac. Wellington 444.1270

Steamer China 556.1795

Over 112.525.” [47]

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the twentieth day of September, one thousand nine hundred and twelve, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex ‘Wellington’

Ac. Off Shore Bunkers 107.590

“ Christian Bors 1597.1180

“ Off Shore Bunkers 16.1300

“ Solveig 1634.1410

3356.

Korea 1363.1010

Damara 300.1464

Nippon Maru 1699.450

Tenyo Maru 268.485 3531.1169

Over 175.1169.”

And the Grand Jurors aforesaid, on their oaths

aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the first day of December, one thousand nine hundred and eleven, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of [48] the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Persia	209.1916
Korea	567.1492
Over 33.1478.”	

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said F. C. Mills did, on the sixth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, pay and cause to be paid to the engineer of the “Shinyo Maru,” whose name is to the Grand Jurors unknown and is therefore not stated herein, but who was the engineer on the said steamship, “Shinyo Maru” belonging to and operated by the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents per ton for all coal which had been, immediately prior to said payment, loaded on said “Shinyo Maru” by the Western Fuel Company, said payment being in lawful money of the United States

and made in order to cause, procure and induce the said engineer to refrain from disclosing to the officers of the United States the existence and operation by said defendants of the said conspiracy, and thereby to enable the said defendants to continue to consummate the object of the said conspiracy and agreement;

And the Grand Jurors aforesaid, on their oaths [49] aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith, at the City and County of San Francisco, in the State and Northern District of California, on the thirty-first day of August, one thousand nine hundred and eleven, caused to be paid to the Engineer of the "American Maru," whose name is to the Grand Jurors unknown, and is for that reason not herein stated, which said steamship belonged to the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents for each and every ton of coal which had been immediately prior thereto loaded aboard said steamship by the Western Fuel Company, said payment being made in order to cause, procure, and induce the engineer aforesaid to refrain from disclosing to the officers of the United States the existence and operation by said defendants of the said conspiracy, and thereby to enable said defendants to continue to consummate and effect the object of the said conspiracy;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of

said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said defendant James B. Smith did, at divers times during the month of December, one thousand nine hundred and twelve, the exact dates in said months being to the Grand Jurors aforesaid unknown, and therefore not stated herein, go to the Folsom Street Bunkers of the Western Fuel Company on the water front of the City and [50] County of San Francisco, State and Northern District of California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith did, at divers times during the month of October one thousand nine hundred and twelve, the exact dates in said month being to the Grand Jurors aforesaid unknown, and therefore not stated herein, go to the Folsom Street Bunkers of the Western Fuel Company on the water front of the City and County of San Francisco, State and Northern District of California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith did, on the third day of May, one thousand nine hundred and eleven, sign and swear to an affidavit in the following language, to wit:

"I, James B. Smith, Vice-president and Stockholder, Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause, except as herein set forth; and that the said merchandise has been delivered to said Pacific Mail Steamship Company between Jany. 27 and February 15-11; and that no other certificate of delivery covering the above [51] merchandise has been issued by me.

JAMES B. SMITH, Importer.

Sworn to before me this 3 day of May, 1911.

GEO. H. PROBASCO,

Notary Public in and for the City and County of San Francisco, State of California. Commission expires April 14, 1913."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN L. McNAB,

United States Attorney.

NAME OF WITNESS APPEARING BEFORE
GRAND JURY.

W. H. Tidwell. [52]

**Exhibit "I" [Indictment Against Howard et al.
(Filed Feb. 19, 1913)].**

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

(5220)

At a stated term of said Court begun and holden
at the City and County of San Francisco, within and
for the State and Northern District of California,
on the first Monday in November, in the year of our
Lord Nineteen Hundred and Twelve,

The Grand Jurors of the United States of Amer-
ica, within and for the State and District aforesaid,
on their oaths present: THAT

JOHN L. HOWARD, JAMES B. SMITH, J. L.
SCHMITT, ROBERT BRUCE, SYDNEY V.
SMITH, F. C. MILLS, E. H. MAYER, AND ED-
WARD J. SMITH,

hereinafter called the defendants, whose more full
and true names are to the Grand Jurors unknown,
heretofore, to wit, on the first day of April in the
year of our Lord Nineteen Hundred and Six, in the
State and Northern District of California and
within the jurisdiction of this Honorable Court then
and there being, did wilfully, knowingly, unlaw-
fully, wickedly, corruptly, and feloniously conspire,
combine, confederate and agree together

Violation
Sec. 37

C. C. U. S.

among themselves and with divers other
persons whose names are to the Grand
Jurors aforesaid unknown and for that rea-

son not herein set forth, to defraud the United States in the manner following, that is to say:

That the said Western Fuel Company was at all the times herein mentioned a corporation organized, existing and doing business under and by virtue of the laws of [53] the State of California, and was at all of said times engaged in the importation into the United States and the sale of coals for fuel, and in purchasing coals from divers other persons, firms and corporations so importing coals into the United States for fuel;

That the said defendants and said divers other persons whose names are to said Grand Jurors unknown did plan, confederate, conspire and agree, under the guise and name of the said corporation, to wit, Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company by itself and through other persons, firms and corporations from divers foreign countries, ports and places for said Western Fuel Company, and to defraud the United States out of a large portion of the duties due to the United States on divers shiploads and cargoes of coal so imported by said Western Fuel Company and other persons, firms and corporations as aforesaid and coming into the Port of San Francisco, by making and causing to be made false weights and false and fraudulent returns of weights of such cargoes and importations of coal, and by further fraudulently weighing and causing to be weighed and reported to the United States the weights of all

such importations of coal loaded from the bunkers and barges of said Western Fuel Company for fuel on board vessels propelled by steam and engaged in the trade with foreign countries and in trade between the Atlantic and Pacific ports of the United States, and which ships or vessels were registered under the laws of the United States; and further to defraud the United States by making false returns, weights and entries of coal shipped and loaded, [54] aboard the transports of the United States Army Service and other Government ships purchasing coal at San Francisco harbor; and to that end and for the purpose of carrying out such conspiracy, combination, and agreement, to maintain on the docks, wharves, and barges owned, operated, controlled, and occupied by said Western Fuel Company and by the said defendants, scales and weights which were to be and were fraudulently manipulated by the defendants to the end that said scales should record the weights of said coal desired by the defendants, and not the true weight of the coal placed thereon, and the said defendants did so manipulate said scales and weights and the method of weighing thereon so that said scales and weights did record the weights of coal desired by said defendants and not the true weight of the coal so placed thereon;

And to further cause fraudulent affidavits and statements to be made by the defendants and by each of them to the United States and to Pacific Mail Steamship Company, a corporation organized and existing under and by virtue of the laws of the State of New York and engaged in the shipping and

transportation of freight and passengers, with offices located in the City and County of San Francisco, and which operated and still operates American registered vessels engaged in foreign trade and buying coal from said Western Fuel Company for the purpose and to the end that said Pacific Mail Steamship Company should claim from the United States a greater rebate on the drawback of coal duties permitted where coal is loaded upon American registered vessels engaged in foreign trade than the true weight of said coal would permit said Pacific Mail Steamship Company [55] to claim or was due said Pacific Mail Steamship Company;

And further to cause all coal weighed in, on or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed to the end and for the purpose that the defendants, acting under the name and guise of said Western Fuel Company aforesaid should receive the profit and gain to be made by such incorrect and fraudulent weight;

That said conspiracy, combination, confederation, and agreement was continuously in effect and operation and in process of execution by the said defendants and each of them from and including the first day of April, Nineteen Hundred and Six, to and including the eighteenth day of February, Nineteen Hundred and Thirteen, and the said conspiracy, combination, confederation and agreement was continuously in operation and in process of execution by said defendants during all of the times mentioned in this indictment, and was continuously in operation

and in process of execution by said defendants and each of them during all the times mentioned in each and every overt act hereinafter set forth and alleged in this indictment;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in the furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourth day of January, Nineteen Hundred and Thirteen, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry: [56]

"Shinyo Maru	389.1337	
Siberia	690.1462	1080.559

Over 60.1759."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the ninth day of January, Nineteen Hundred and Thirteen, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

"Siberia	810.19	
Andrew Kelly	40	
G. E. Foster	40	890.19

Over 20.1299."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the tenth day of January, Nineteen Hundred and Thirteen, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for recording of the weight of coal loaded from barges into vessels, the following entry:

“Korea	974.448	
Mathilda	210.145	1184.593

Over 72.1023.” [57]

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourteenth day of January, Nineteen Hundred and Thirteen, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex ‘Comanche’ Wellg.	
Ac. Wellington.	444.1270
Steamer China	556.1795
Over 112.525.”	

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and

agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the twentieth day of September, Nineteen Hundred and Twelve, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex ‘Wellington’

Ac. Off Shore Bunkers	107.590
“ Christian Bors	1597.1180
“ Off Shore Bunkers	16.1300
“ Solveig	1634.1410

3356. [58]

“Korea	1363.1010	
“Damara	200.1464	
Nippon Maru	1699.450	
Tenyo Maru	268.485	3531.1169

Over 174.1169.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the first day of December, Nineteen Hundred and Eleven, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for the recording of the weight of

coal loaded from barges into vessels, the following entry:

"Persia	209.1916
Korea	567.1492
Over 33.1478."	

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said F. C. Mills did, on the sixth day of January, Nineteen Hundred and Thirteen, at the City and County of San Francisco, State and Northern District of California, pay and cause to be paid to the Engineer of the "Shinyo Maru," whose name is to the Grand Jurors unknown and is therefore not stated herein, but who was the Engineer on the said steamship "Shinyo Maru" [59] belonging to and operated by the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents per ton for all coal which had been, immediately prior to said payment, loaded on said "Shinyo Maru" by the Western Fuel Company, said payment being in lawful money of the United States and made in order to cause, procure, and induce the said Engineer to refrain from disclosing to the officers of the United States the existence and operation by said defendants of the said conspiracy, and thereby to enable the said defendants to continue to consummate the object of the said conspiracy and agreement;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of

said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith, at the City and County of San Francisco, in the State and Northern District of California, on the thirty-first day of August, Nineteen Hundred and Eleven, caused to be paid to the engineer of the "America Maru," whose name is to the Grand Jurors unknown and is for that reason not herein stated, which said steamship belonged to the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents for each and every ton of coal which had been immediately prior thereto loaded aboard said steamship by Western Fuel Company, said payment being made in order to cause, procure, and induce the Engineer aforesaid to refrain from disclosing to the officers of the United States the existence and operation by said defendants of the said conspiracy, and thereby to enable said defendants to continue to consummate and effect the object of the [60] said conspiracy;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement and to effect and accomplish the object thereof, the said defendant James B. Smith did at divers times during the month of December, Nineteen Hundred and Twelve, the exact dates in said month being to the Grand Jurors unknown and therefore not stated herein, go to the Folsom Street Bunkers of the Western Fuel Company, on the waterfront of the City and County of San Francisco, State and Northern District of California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, said defendant James B. Smith did, on the third day of May, Nineteen Hundred and Eleven, sign and swear to an affidavit in the following language, to wit:

“I, James B. Smith, Vice-president and stockholder, Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause, except as herein set forth; and that the said merchandise has been delivered to said Pacific Mail Steamship Company between Jany. 27 and February 15-11; and that no other certificate of delivery covering the above merchandise has been issued by me.

JAMES B. SMITH,

Importer.

Sworn to before me this 3 day of May, 1911. [61]

GEO. H. PROBASCO,

Notary Public in and for the City and County of
San Francisco, State of California.

Commission expires April 14, 1913.”

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of said United States of America in such case made and provided.

J. L. McNAB,

United States Attorney.

NAMES OF WITNESSES APPEARING BE-
FORE THE GRAND JURY:

John W. Smith.	W. H. Tidwell.
David G. Powers.	L. E. Bemis.
E. E. Englow.	Capt. Henry Nelson.
D. D. Norcross.	Edwin Powers.
Wm. Bunker.	

[Endorsed]: Presented in open court and filed Feb. 19, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [62]

Exhibit "K" [Indictment Against Howard et al.].

In the District Court of the United States, in and for the Northern District of California, First Division.

At a stated term of said Court begun and holden at the City and County of San Francisco within and for the State and Northern District of California on the first Monday of March in the year of our Lord one thousand nine hundred and thirteen.

The Grand Jurors of the United States of America, within and for the State and Northern District of California, on their oaths present: THAT

JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMITT, ROBERT BRUCE, SIDNEY V. SMITH, F. C. MILLS, E. H. MAYER AND EDWAYD J. SMITH,

hereinafter called the defendants, whose more full and true names are to the Grand Jurors unknown, heretofore, to wit, on the first day of April, in the year of our Lord one thousand nine hundred and six, in the State and Northern District of California,

and within the jurisdiction of this Honorable Court then and there being, did willfully, knowingly, unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree together among themselves and with divers other persons whose names are to the Grand Jurors aforesaid, unknown, and for that reason not herein set forth, to defraud the United States in the manner following, that is to say:

That the Western Fuel Company was at all the times herein mentioned, a corporation organized, existing and doing business under and by virtue of the [63] laws of the State of California, and was at all of said times engaged in the importation into the United States and the sale of coals for fuel, and in purchasing coals from divers other persons, firms and corporations so importing coals into the United States for fuel.

That the said defendants and said divers other persons whose names are to the Grand Jurors aforesaid, unknown, did plan, confederate, conspire and agree, under the guise and name of the said corporation, to wit, Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company by itself and through other persons, firms and corporations from divers foreign countries, ports and places for said Western Fuel Company, and to defraud the United States out of a large portion of the duties due to the United States on divers shiploads and cargoes of coal so imported by said Western Fuel Company and

other persons, firms and corporations as aforesaid and coming into the port of San Francisco, by making and causing to be made false weights and false and fraudulent returns of weights of such cargoes and importations of coal, and by further fraudulently weighing and causing to be weighed and reported to the United States the weights of all such importations of coal loaded from the bunkers and barges of said Western Fuel Company for fuel on board vessels propelled by steam and engaged in trade with foreign countries and in trade between the Atlantic and Pacific ports of the United States, and which ships or vessels were registered under the laws of the United States; [64] and further to defraud the United States by making false returns, weights and entries of coal shipped and loaded aboard the transports of the United States Army Service and other Government ships purchasing coal at San Francisco harbor; and to that end and for the purpose of carrying out such conspiracy, combination and agreement to maintain on the docks, wharves and barges owned, operated, controlled, and occupied by said Western Fuel Company and by the said defendants, scales and weights which were to be and were fraudulently manipulated by the defendants to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon, and the said defendants did so manipulate said scales and weights and the method of weighing thereon so that said scales and weights did record the weights of coal desired by said defendants and not the true

weight of the coal so placed thereon;

And to further cause fraudulent affidavits and statements to be made by the defendants and by each of them to the United States and to Pacific Mail Steamship Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and engaged in the shipping and transportation of freight and passengers, with offices located in the City and County of San Francisco, and which operated and still operates American registered vessels engaged in foreign trade and buying coal from said Western Fuel Company for the purpose and to the end that said Pacific Mail Steamship Company should claim from the United States a [65] greater rebate on the drawback of coal duties permitted where coal is loaded upon American registered vessels engaged in foreign trade than the true weight of said coal would permit said Pacific Mail Steamship Company to claim or was due said Pacific Mail Steamship Company, and the defendants thereby secure the selling price for a greater number of tons than were actually delivered and sold;

And further to cause all coal weighed in, on, or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed to the end and for the purpose that the defendants, acting under the name and guise of said Western Fuel Company aforesaid, should receive the profit and gain to be made by such incorrect and fraudulent weight; and to that end to cause accounts and books of account to be kept

under the name of the Western Fuel Company, a corporation, in which should be recorded accounts of the invoice weights of imported coals, the recorded weights thereof on entry into the port of San Francisco, the bunker and barge weights, and weights of coal as claimed to be delivered aboard all vessels, including the fraudulent overweights of all such coal.

And further, to the end that the aforesaid fraudulent acts of the defendants should not be disclosed by the engineers and other officers of steamships purchasing coal and the fraud be discovered, did further conspire, in the same agreement, combination and conspiracy, to pay to all engineers and other officers whose names are to the Grand Jurors aforesaid unknown, of the Toyo Kisen [66] Company's steamships, and steamships of other companies to the Grand Jurors aforesaid unknown, divers sums of money as bribes to prevent the frauds of the defendants from being discovered by the United States;

That said conspiracy, combination, confederation and agreement was continuously in effect and operation and in process of execution by the said defendants and each of them from and including the first day of April, in the year of our Lord one thousand nine hundred and six, to and including the eighteenth day of June in the year of our Lord one thousand nine hundred and thirteen, and the said conspiracy, combination, confederation and agreement was continuously in operation and in process of execution of said defendants during all of the

times mentioned in this indictment, and was continuously in operation and in process of execution by said defendants and each of them, during all the times mentioned in each and every overt act hereinafter set forth and alleged in this indictment;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourth day of January, in the year of our Lord one thousand nine hundred and thirteen at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry: [67]

“Shinyo Maru	389.1337	
Siberia	690.1462	1080.559

Over 60.1759.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the ninth day of January in the year of our Lord one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording

of the weight of coal loaded from barges into vessels, the following entry:

“Siberia	810.19	
Andrew Kelly	40	
G. E. Foster	40	890.19

Over 20.1299.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the tenth day of January in the year of our Lord one thousand nine hundred and thirteen, at the City and County of San *County of San* Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel [68] Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Korea	974.448	
Mathilda	210.145	1184.593

Over 72.1023.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourteenth day of January in the year of our Lord one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the

book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex ‘Comanche’ Wellg.

Ac. Wellington	444.1270
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Steamer China	556.1796
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Over 112.525.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the twentieth day of September in the year of our Lord one thousand nine hundred and twelve, at the City and County of San Francisco, in the State and Northern District of California, [69] make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex ‘Wellington’

Ac. Off Shore Bunkers	107.590
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“ Christian Bors	1597.1180
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“ Off Shore Bunkers	16.1300
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“ Solveig	1634.1410
-----------	-----------

3356.

Korea	1363.1010
-------	-----------

Damara	200.1464
--------	----------

Nippon Maru	1699.450
-------------	----------

Tenyo Maru	268.485	3531.1169
------------	---------	-----------

Over 175.1169.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the first day of December in the year of our Lord one thousand nine hundred and eleven, at the City and County of San Francisco in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Persia 209.1916

Korea 567.1492

Over 33.1478.” [70]

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said F. C. Mills did, on the sixth day of January in the year of our Lord one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, pay and cause to be paid to the Engineer of the “Shinyo Maru,” whose name is to the Grand Jurors aforesaid, unknown, and is therefore not stated herein, but who was the engineer on the said steamship “Shinyo Maru” belonging to and operated by the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents per ton for all coal which had been, immediately prior to said payment, loaded on said “Shinyo Maru” by the West-

ern Fuel Company, said payment being in lawful money of the United States and made in order to cause, procure, and induce the said engineer to refrain from disclosing to the officers of the United States, the existence and operation by said defendants of the said conspiracy, and thereby to enable the said defendants to continue to consummate the object of the said conspiracy and agreement;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith, at the City and County of [71] San Francisco, in the State and Northern District of California, on the thirty-first day of August, in the year of our Lord one thousand nine hundred and eleven, caused to be paid to the engineer of the "American Maru," whose name is to the Grand Jurors aforesaid, unknown, and is for that reason not herein stated, which said steamship belonged to the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents for each and every ton of coal which had been immediately prior thereto, loaded aboard said steamship by the Western Fuel Company, said payment being made in order to cause, procure, and induce, the engineer aforesaid, to refrain from disclosing to the officers of the United States the existence and operation by said defendants, of the said conspiracy, and thereby to enable said defendants to continue to consummate and effect the object of the said conspiracy;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith did, at divers times during the month of December, one thousand nine hundred and twelve, the exact dates in said month being to the Grand Jurors aforesaid unknown, and therefore not stated herein, go to the Folsom Street bunkers of the Western Fuel Company on the waterfront of the City and County of San Francisco, in the State and Northern District of California; [72]

And the Grand Jurors aforesaid on their oaths aforesaid, do further present, that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, said defendant James B. Smith did on the third day of May in the year of our Lord one thousand nine hundred and eleven, sign and swear to an affidavit in the following language, to wit:

“I, James B. Smith, Vice-President and stockholder, Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause, except as herein set forth; and that the said merchandise has been delivered to said Pacific Mail Steamship Company between Jany. 27, and February 15-11; and that no other certificate of delivery covering the above merchandise

has been issued by me.

JAMES B. SMITH,
Importer.

Sworn to before me this 3 day of May, 1911.

GEO. H. PROBASCO,

Notary Public in and for the City and County of
San Francisco, State of California.

Commission expires April 14, 1913."

AGAINST the peace and dignity of the United
States of America, and contrary to the form of the
statute of the said United States of America in such
case made and provided.

United States Attorney. [73]

NAMES OF WITNESSES APPEARING BE-
FORE THE GRAND JURY:

David Powers.

L. Bemiss.

W. H. Tidwell.

Edward Powers.

D. C. Norcross.

John W. Smith. [74]

Sass.

Exhibit "L" [Evidentiary on Hearing of Contempt Order].

In the District Court of the United States for the Northern District of California.

Honorable MAURICE T. DOOLING, Judge.

In the Matter of the Presentment Heretofore Returned by the Grand Jury Against D. C. NORCROSS, as Secretary of the WESTERN FUEL COMPANY, a Corporation, for Contempt of the Above-entitled Court.

Monday, August 18th, 1913.

EVIDENTIARY SHOWING ON HEARING OF CONTEMPT ORDER. [75]

In the District Court of the United States for the Northern District of California.

Honorable MAURICE T. DOOLING, Judge.

In the Matter of the Presentment Heretofore Returned by the Grand Jury Against D. C. NORCROSS, as Secretary of the WESTERN FUEL COMPANY, a Corporation, for Contempt of the Above-entitled Court.

Monday, August 18th, 1913.

Mr. STANLEY MOORE.—At this time, if your Honor please, the respondent would like to make an evidentiary showing consisting of an affidavit and a supplemental affidavit made by the respondent, Mr. D. C. Norcross.

The affidavit is as follows:

"D. C. Norcross, being first duly sworn, deposes and says: I am now and have been at all the times

herein mentioned the Secretary of the Western Fuel Company, and have had possession of its books and papers.

The president, vice-president, treasurer and directors of the company have been indicted for conspiracy to defraud the Government out of *sum* aggregating about \$30,000.00 through the medium of the Western Fuel Company. Three sets of indictments have been returned against them, and these indictments charge a continuing conspiracy from 1904 to June, 1913. [76]

The trial of these indictments is set for Tuesday, August 26, 1913, in this court. For several weeks past the attorneys have been requiring me to make up tables, compilations, summaries and statements from these books and certain of these tables, statements and compilations are still uncompleted and these books are being made use of every day in the preparation of the defense of its officers and directors. I am informed by the attorneys, and I believe, and I therefore state, that they will continue to require the use of these books up to the time of trial which is only eight days from to-day.

The purported subpoena served upon me on August 14, 1913, calls for the production of all the books the company has. To produce them would involve a suspension of the company's business. press wagons to carry them out to the Grand Jury. They are so numerous that it would take two ex-room. It consists of a wholesale demand for all the company's books and papers.

When the company's officers were informed in February of this year that the Grand Jury was conducting an investigation and desired to use its books, they instructed me to tell the then United States District Attorney, Mr. John L. McNab, that they would throw the books open to anyone designated by him to make an investigation of them.

I communicated this offer to Mr. McNab; and a day or two later he sent Mr. Tidwell with two assistants to the offices of the company for the purpose of examining the books. Mr. Tidwell and his assistants examined these books continuously for from two to three weeks. After concluding this examination they came back and borrowed a number of books, papers and statements, which they took to Mr. Tidwell's office and kept for several weeks. [77]

When indictments were afterwards returned, I and the other officials and directors of the company felt that unwarranted and unfair construction and inferences had been drawn from the information and books which had been freely and unreservedly furnished by them.

When on August 5, 1913, I was served with a subpoena to appear before the Grand Jury, I showed it to counsel and asked what it meant. Counsel informed me that the pending indictments extended from the incorporation of the Company in 1904 up to June, 1913, and that almost all the books and papers called for related to this same period, and that he believed the present pros-

ecuting attorneys were dissatisfied with the evidentiary showing upon which the indictments had been returned, and that in all probability it was merely an attempt to again get possession of the books of the company for the purpose of reviewing and again going through them.

Outside the Grand Jury room that afternoon I saw Mr. Tidwell, and I said, 'Is this for the purpose of bringing further indictments?' He replied: 'No, this is not for the purpose of further indictments, we didn't get the records prior to 1906.' I then said, 'No, you didn't get those records because they were burned in the fire, and I told you so at the time you were making your examination.'

The next day, August 7, 1913, Mr. Tidwell telephoned me and asked me to come down to his office, as there were some matters he wanted to talk over with me. After I got there he stated that the place the books were wanted was in his office, as 'it would be handiest to work on them there.'

On the next day, August 8, 1913, the following news item appeared in the San Francisco Examiner:

'JURY RESUMES FUEL CO. TRIAL. [78]
David C. Norcross, Secretary of Organization,
Examined by Prosecutor Roche.

The federal grand jury at its first meeting yesterday afternoon resumed the investigation of the alleged Western Fuel Company frauds. The government was represented by Theodore Roche, Esq., special prosecutor, and he spent a whole

hour examining David C. Norcross, Secretary of the Western Fuel Company.

It is understood that Special Prosecutor Roche has instituted further investigations of the Western Fuel Company to gather evidence to be used in the coming trial of the eight officials who were indicted on the charge of conspiracy.'

The contents of this item, as I am informed and believe and therefore state, were given out by, or with the consent of the Special Assistants to the Attorney General mentioned therein. I am further informed and believe and therefore state that this article correctly states their intention in having me subpoenaed before the Grand Jury.

On August 14, 1913, the subpoena specifically mentioned in the citation was served upon me. A copy of this subpoena is attached hereto and marked Exhibit 'A.' It will be observed from reading it that it does not state that there is any case or matter being investigated by the Grand Jury. It simply requires me to appear before the Grand Jury at 2 o'clock that afternoon and bring with me all the books and papers of the company of every description.

After consulting counsel I appeared before the Grand Jury at the appointed time, and gave the following answer:

'Counsel have instructed me that I am not required under [79] this subpoena, either to testify before the Grand Jury or to produce the books and papers of the Western Fuel Company. Accordingly, without any disrespect to the Grand Jury

I must decline to testify further or to produce the books until the Court has passed upon the matter.'

It seems to me that it would be unreasonable to expect the company to turn over all of its books, and especially at this time when the defendants have need of the books and are making continual and daily use of them in preparing for their oncoming trials.

I have been informed by counsel and upon information and belief I state that the range of this subpoena in calling for the production of every book and paper belonging to the company constitutes an unreasonable seizure.

I have been informed by counsel, and upon such information and belief state the fact to be that a Grand Jury has no right to institute a new or supplemental investigation in the hope of eliciting additional testimony to supplement or strengthen the testimony on which indictments have already been found, or in an attempt to aid the prosecutors in the trial of their case. Indictments should not have been returned in the first instance, unless there was sufficient evidence upon which to predicate them.

I do not believe there ever has been an intention of exhibiting these books or examining them in the presence of the Grand Jury or during its sessions, but I believe the fact to be, as I was informed by Mr. Tidwell, and I therefore state that what was really wanted of me was to turn the books over to Mr. Tidwell so that he might

work upon them at his office.

This citation was not served upon me until in the neighborhood of eleven o'clock last Saturday morning. There was [80] then no time left to subpoena witnesses. If any further proof is required as to the character and purpose of the investigation attempted by the Grand Jury I would ask for the issuance of forthwith subpoenas in order that oral testimony may be taken."

If your Honor would please follow the subpoena itself, which is attached to this affidavit, while I read a copy of it to you, it will be easier to see how broad and sweeping and general the range of the subpoena is.

"WE COMMAND YOU, that all business and excuses being laid aside, you appear before the Grand Jury of the United States of America, within and for the Northern District of California, at a District Court to be held in the United States courthouse, in the Postoffice Building, in the City and County of San Francisco, on the 14th day of August, 1913, at 2 o'clock in the afternoon, and that you produce before the said grand jury at the time and place aforesaid, the following":

We do not intend to stop to argue the matter at this time, if your Honor please, but parenthetically we would like to call your Honor's attention to the fact that no case or matter or investigation is specified or referred to in that subpoena.

"All books, papers, records and vouchers, of the Western Fuel Company, a corporation, in your pos-

session or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company situate on Folsom Street Dock in the City and County of San Francisco on the 1st day of January, 1904, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker, and also showing the amount and weight of coal on the 1st day of January, 1904, in the coal-yard of said Western Fuel Company connected with [81] said bunker by a tramway and situate on East Street, in said City and County of San Francisco, and also showing the amount and weight of all coal in all other bunkers, and places containing, or which contained coal of the Western Fuel Company, on the 1st day of January, 1904, in the State of California.”

We also want to call your Honor’s attention to the fact that all these demands relate back to January, 1904, notwithstanding the statement of the witness which he claims to have repeatedly made to Mr. Tidwell, that there are no such papers extant between 1904 and April, 1906.

“Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker and delivered from said yard, between the 1st day of January, 1904, and the date hereof.

Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the amount and

weight of coal on this date in said bunker of said Western Fuel Company, including said off-shore and said in-shore bunker, and in said yard.

Also all books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company, situate on said Folsom Street Dock, on the 1st day of May, 1906, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker, and also showing the amount and weight of coal on the 1st day of May, 1906, in said coal-yard of said Western Fuel Company; and also showing the amount and weight of all coal in all other bunkers and places in the State of [82] California containing or which contained coal of the Western Fuel Company on the 1st day of May, 1906.

Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker, and delivered from said yard, between the 1st day of May, 1906, and the date hereof; also showing all coal delivered from any and all other bunkers and places containing, or which contained coal of the Western Fuel Company between the 1st day of January, 1904, and the date hereof; and also between the 1st day of May, 1906, and the date hereof.|

Also all books, papers, records and documents

of said Western Fuel Company, a corporation, in your possession or under your control, showing the weight of each load of coal taken from said in-shore and said off-shore bunker and out of said yard, and out of all other bunkers and places containing, or which contained coal of said Western Fuel Company, between the 1st day of January, 1904, and the date hereof; also showing the name of the person or persons to whom each of said loads of coal was sold or delivered, the date or dates upon which each of said loads of coal was so sold or delivered; and the amount charged to the person or persons to whom each of said loads of coal was so sold or delivered, and the amount paid for each of said loads of coal so sold or delivered.

Also all weekly, monthly and yearly financial and other reports made to the Directors of the Western Fuel Company, showing the financial condition of the affairs of said company; also the minute books of said company containing the minutes of the meetings of the Directors and the minutes of the meetings [83] of the stockholders of said company between the 1st day of January, 1904, and date hereof.

Also all stock ledgers, stock journals and stock certificate books showing the names of the various holders of shares of the capital stock of said Western Fuel Company on the 1st day of January, 1904, and at all times between January 1, 1904, and the date hereof.

Also all ledgers, cash-books and papers showing the expenses incurred and paid out by said West-

ern Fuel Company between the 1st day of January, 1904, and the date hereof, and to whom said payments were made.”

And next, if your Honor please, we want to read and offer just a brief supplementary affidavit by Mr. Norcross, which is as follows:

“I am not apprised by any grand juror or officer of the government or otherwise of the name of any of the parties with respect to whom I was called on to testify, or to produce books, papers or other documents, nor was I informed by anyone of the nature of the charge against any party before said grand jury.

Furthermore that it is and was impossible for me, or for any other officers or employee of said Western Fuel Company, to collect the books, papers and statements called for by said *subpoena duces tecum* within the time called therefor, said subpoena having been served upon me in the morning of August 14, 1913, and called for my appearance and production before said grand jury of said books, papers and statements that afternoon at 2 o'clock. And the fact is, as I have repeatedly stated to Mr. Tidwell, the books and papers of the company prior to April, 1906, were destroyed in the fire of April 18, 19 and 20, 1906.” [84]

And next we want to direct your Honor's attention to the concluding statement made by Mr. Norcross in his main affidavit wherein he says: “This citation was not served upon me until in the neighborhood of 11 o'clock last Saturday morning. There was then no time left to subpoena witnesses. If any

further proof is required as to the character and purpose of the investigation attempted by the grand jury I would ask for the issuance of forthwith subpoenas in order that oral testimony may be taken."

I do not anticipate, however, if your Honor please, that there will be any further claim or any dispute upon that particular point. However, as the burden is really upon the Government in this matter and they are supposed to assume the burden of proof as we understand it, we would like to ask now what the evidentiary showing is that they have to offer in support of this citation that was served upon Mr. Norcross last Saturday morning.

Mr. KNIGHT.—And before that, if the Court please, we would like to make some little further showing here. I presume, Mr. Sullivan, it will be admitted that the Mr. Tidwell referred to in these affidavits is the Special Agent of the Treasury Department, and in charge of the collection of evidence used before the grand jury in these matters, and also in charge of the collection of evidence on behalf of the Government in these pending cases against the officers and employees of the Western Fuel Company.

Mr. SULLIVAN.—Yes, I will admit that.

Mr. KNIGHT.—Will it also be admitted, Mr. Sullivan, without the necessity of calling witnesses, that some ten days ago you stated to Mr. Warren Olney, Jr., in his office, that there were no further proceedings contemplated against the parties under indictment and connected with the Western Fuel Company? [85]

Mr. SULLIVAN.—I will state that I had a conversation with Mr. Olney about 10 days ago; in response to a statement made by him that he was inclined to advise the production of books that at that time while having a conversation with him the Government had no present intention of filing any further indictments against the Western Fuel Company or the defendants. That is correct, Mr. Olney, is it not?

Mr. OLNEY.—Yes, Mr. Sullivan, that was your statement to me.

Mr. SULLIVAN.—Yes, that we had then no present intention. You now claim for the first time that the time for compliance with the subpoena was too short, do you?

Mr. KNIGHT.—That is only one of our grounds.

Mr. SULLIVAN.—There was no such objection made when Mr. Norcross appeared before the Grand Jury.

Mr. KNIGHT.—We also ask to have your Honor consider in evidence the presentment of the grand jury, the citation that was served upon the Western Fuel Company and upon Mr. Norcross, and the subpoena, with the Marshal's return upon those papers.

Mr. SULLIVAN.—Mr. Knight, there was another subpoena served before that, one that was served on the 14th.

Mr. KNIGHT.—The one that preceded the 14th?

Mr. SULLIVAN.—Yes, there was one served on the 12th.

Mr. STANLEY MOORE.—Well, we can produce that.

Mr. SULLIVAN.—You will admit that there was a subpoena served on Mr. Norcross and the Western Fuel Company requiring the production of the books before the grand jury on the 12th day of August?

Mr. KNIGHT.—Yes.

Mr. SULLIVAN.—And that subpoena was substantially in the same form, so far as the production of the books and papers is [86] concerned as the subpoena of the 14th?

Mr. KNIGHT.—Well, I have not compared them, Mr. Sullivan.

Mr. STANLEY MOORE.—We will produce the subpoena.

Mr. SULLIVAN.—Very well.

Mr. KNIGHT.—There is a difference in that the present subpoena does not specify any proceeding pending before the grand jury. Will you admit that?

Mr. SULLIVAN.—No, we will not admit that.

Mr. KNIGHT.—We want to call Mr. Hanify with reference to questions as to whether there was anything pending before the Grand Jury at the time that subpoena was served on Mr. Norcross, and at the time that Mr. Norcross attended.

Mr. SULLIVAN.—We consider that showing immaterial, if your Honor please. How can the Grand Jury know what the Government intends to present?

Mr. KNIGHT.—What we want to show is that at the time that Mr. Norcross was served with a subpoena—I would suggest this, Mr. Sullivan, that you admit, subject to its materiality, that there was not

at the time of the service of the subpoena on August 14th and at the time Mr. Norcross appeared before the Grand Jury, or theretofore, and after the last indictment had been returned against the present defendants, any proceeding pending before the Grand Jury or any charge before the Grand Jury against these defendants, or any of them.

Mr. SULLIVAN.—I will admit that there was no formal charge pending before the Grand Jury at the time the subpoena was served upon Mr. Norcross; but to a certain extent there was a proceeding pending before the Grand Jury because Mr. Norcross had attended before the Grand Jury on two occasions before that, and he was sworn and questioned and testified to a certain extent. [87]

Mr. KNIGHT.—Mr. Sullivan was that proceeding anything further than merely a proceeding to obtain an examination of the books, papers and documents of the Western Fuel Company that are specified in the subpoena?

Mr. SULLIVAN.—In the first place, we consider that fact immaterial, and in the next place the Government is not called upon to disclose the intention which it had when it called upon Mr. Norcross to produce the books of the Western Fuel Company.

Mr. KNIGHT.—Of course, Mr. Sullivan, we don't ask you to waive any objection you may have as to the materiality or relevancy of that evidence. We merely want to get the fact before the Court as to the fact that there was no proceeding against these defendants or any of them pending, nor had any charge been made against these defendants or any

of them to the grand jury at the time of the service of these subpoenas and at the time the witness was called upon to testify in obedience to them.

Mr. SULLIVAN.—I will admit that at the time the subpoena was served there were no formal proceedings pending against the Western Fuel Company or against any of the defendants named in the indictment. That is as far as the Government will go. But I will state in good faith to counsel that there are other parties involved in these frauds who have not yet been indicted. And I will state that it is the intention of the Government to ascertain to what extent these other parties have been involved, and if their action is criminal, then the Government will take such course as it deems proper in the premises. But I frankly admit that when the subpoena was served the Government had and at that particular time any formal charges pending against the Western Fuel Company or against its directors, other than those charges which are now pending and appear in the indictments heretofore filed in this court. [88]

Mr. KNIGHT.—Of course, you refer to the formal charge. I don't know whether any distinction could be made as between a formal or an informal charge. My point is, and I ask you to admit it if it is the fact, that at this time there was no charge that had been presented by the District Attorney or by Special Counsel for the Government against the defendants under the present indictments, or any of them, and that no charge had been originated so far as you

know in the Grand Jury without the consent of the District Attorney.

Mr. SULLIVAN.—We will make that admission in so far as the Western Fuel Company and the present defendants are concerned. We will not make any admission as to any others, Mr. Knight.

Mr. STANLEY MOORE.—Is that all of your showing, Mr. Sullivan?

Mr. SULLIVAN.—We will stipulate, I suppose, as to the documentary evidence to go before the Court, Mr. Knight?

Mr. KNIGHT.—We want to offer, if the Court please, in connection with our case, the presentment of the Grand Jury against the Western Fuel Company and against Mr. D. C. Norcross; and we offer the citation and the subpoena served upon each of these parties, the citation which followed the presentment in each of these cases and the subpoena of the 14th of August—the *subpoena duces tecum* that was served upon each of these parties. Mr. Roche, have you the two Grand Jury subpoenas served on the 14th of August, and which called for the attendance of Mr. Norcross and the books of the Western Fuel Company?

Mr. SULLIVAN.—I assume, Mr. Knight, that the copies in your answer are correct?

Mr. KNIGHT.—Oh, yes, I think so.

Mr. SULLIVAN.—Then you may use those copies the same as the originals. [89]

Mr. KNIGHT.—All right.

Mr. ROCHE.—There will be no question at all about those copies.

Mr. SULLIVAN.—Mr. Knight, will you admit that the first subpoena was served upon Mr. Norcross and the Western Fuel Company on the 5th of August?

Mr. KNIGHT.—Yes. I think there is no question about that. There were various subpoena served, one on the 5th and one I think on the 12th and one on the 14th.

Mr. ROCHE.—There were only two subpoenas served—one on the 5th and Mr. Norcross was directed to return to the Grand Jury, and the other one was on the 14th.

Mr. STANLEY MOORE.—My recollection is that there were three subpoenas served, the one on the 5th, and that was not quite so *omnibus* in its requirements as the next one which followed that; and then there was one on the 14th, and then there was one intermediate between the 5th and the 14th.

Mr. ROCHE.—That is correct, yes, because Mr. Norcross did testify at the first session that he did have these records in his possession covering the period between January, 1904, and the date of the fire; that testimony was subsequently modified.

Mr. STANLEY MOORE.—If that is so, Mr. Roche, I think you had better make an evidentiary showing as to that fact because I think you will find you are entirely mistaken in regard to it.

Mr. SULLIVAN.—Before making that showing we will ask counsel to admit that Mr. Norcross as the Secretary of the Western Fuel Company appeared before the Grand Jury on the 12th and read before

the Grand Jury a statement which I now hold in my hand. [90]

Mr. KNIGHT.—Mr. Sullivan, I understand that at that time the *subpoena duces tecum* was directed to Mr. Norcross himself. It was your subpoena of the 14th that named the Western Fuel Company as the party to produce the books. We admit that he did make that statement to the Grand Jury on the 12th and again on the 14th.

Mr. SULLIVAN.—It is admitted then by the Respondent that on the 12th day of August, Mr. D. C. Norcross, the Secretary of the Western Fuel Company appeared before the Grand Jury as such Secretary and read the following paper:

“I have been instructed by counsel that I am not obliged under this subpoena to testify before the Grand Jury or to produce the books and papers of the Western Fuel Company accordingly, and without any disrespect to the Grand Jury, I must decline to testify further or to produce the books and papers until the Court has passed upon the matter.”

It is also admitted that upon the 14th day of August, in obedience to a subpoena directed to D. C. Norcross as the Secretary of the Western Fuel Company and a subpoena directed to the Western Fuel Company, Mr. Norcross again appeared before the Grand Jury and was then sworn; that thereupon after having been sworn, he produced the same paper which I have just read declining to testify before the Grand Jury or to produce the books or papers until the Court passed upon the matter.

Mr. KNIGHT.—That is admitted.

Mr. SULLIVAN.—It is admitted, I suppose, that D. C. Norcross is still the Secretary of the company?

Mr. KNIGHT.—That is admitted.

Mr. SULLIVAN.—And I understand it is stated in the answer that as such Secretary he has the custody and possession of all the books and papers?
[91]

Mr. STANLEY MOORE.—Do you want us to admit, Mr. Sullivan, that all of the statements contained in the affidavits are true?

Mr. SULLIVAN.—Oh, no. There is considerable immaterial matter in the affidavit which, of course, we will ask the Court to ignore in passing upon the question.

It is admitted that the Secretary has in his possession and under his control those papers which were not destroyed by the fire in 1906?

Mr. KNIGHT.—Yes, that is correct.

Mr. SULLIVAN.—As well as the papers of defendant corporation that have been kept since the year 1906, since the fire.

Mr. KNIGHT.—Yes.

Mr. SULLIVAN.—Well, it seems to me, if your Honor please, that that brings the matter down to a question of law and not a question of fact. We are ready to proceed and argue the questions of law.

Mr. KNIGHT.—We are ready.

Mr. SULLIVAN.—Inasmuch as they make these legal objections, if your Honor please, to the sufficiency of the subpoena and the regularity of these proceedings, and inasmuch as it appears that Mr.

Norcross the Secretary did, in obedience to the subpoena appear before the Grand Jury and refuse to submit the books, we submit that they must have a showing to justify the conduct of the Respondent Norcross and the conduct of the Western Fuel Company.

Mr. STANLEY MOORE.—If your Honor please, Mr. Hanify, the foreman of the Grand Jury, is in attendance now and we do not like to ask that he remain here. I think that perhaps it would save time to remove some of these questions about which argument might be made if we should just put him on the stand and let him go [92] his way.

Mr. SULLIVAN.—What do you want to prove by him?

Mr. STANLEY MOORE.—I will call him to the stand and ask him the questions. I want to prove by him, that, as a matter of fact, there was no investigation of any kind pending before the Grand Jury; that this gentleman was just subpoenaed there to produce these books and papers, and there was no idea of an indictment. The idea was that you should get possession of them, or rather, Mr. Tidwell, in order that he could work on them, just as he told Mr. Norcross down in the office that day. If there is going to be any dispute about that, or any dilly-dallying or splitting of hairs as to whether there were supposedly some mysterious person who might be indicted, some person on the stock books or on the ledgers, we want to get that matter behind us.

Mr. ROCHE.—Well you don't mean to say that Mr. Hanify is in a position to say that any indict-

ments were pending against any people other than as against any officials of the company, do you? He certainly has not given you that information.

Mr. STANLEY MOORE.—Well, Mr. Roche, we know what you have said; we know what you have said in that interview of yours in the “Examiner.” And we know what Mr. Sullivan said down in Mr. Olney’s office, that no further indictments were contemplated. We also know what Mr. Tidwell said, that this was not a matter of further indictment. Now, to remove any possibility of doubt about it, and in order that this Court may act without any doubt upon the matter at all, and in so far as this can be determined as a question of law, we would like to call the remaining factor and prove by the spokesman of the Grand Jury that there was no further idea of indictments in so far as this proceeding was concerned. As long as there is a disposition here, for the purposes [93] of this argument, to say that the Grand Jury might have been looking into these books for the purpose of indicting additional persons, we want to set that at rest.

Mr. SULLIVAN.—You want to prove by him that so far as he is personally concerned he did not know of any such procedure?

Mr. STANLEY MOORE.—Precisely.

Mr. SULLIVAN.—He cannot speak for the Government or for the other Grand Jurors, can he?

Mr. STANLEY MOORE.—No. I think in a measure he could speak for the other Grand Jurors, he being the foreman and the head of the Grand Jury.

But if you will admit that Mr. Hanify, if produced upon the stand, would testify, subject to your objections, that this matter was brought before the Grand Jury in the way of this subpoena and these papers brought up here, at their first session without any idea so far as he was concerned, or other members of the grand jury, so far as his knowledge and information is concerned, of preferring any other indictments but simply to enable you gentlemen, or the special agents, to check over these books, then there will be no occasion for calling him.

Mr. SULLIVAN.—We won't make the last admission.

Mr. STANLEY MOORE.—Mr. Hanify, will you step forward, please.

JOHN R. HANIFY, called and sworn:

Mr. STANLEY MOORE.—Q. Your name is John R. Hanify? A. Yes, sir.

The COURT.—What do you wish to show by this witness other than what counsel has expressed a willingness to admit?

Mr. STANLEY MOORE.—Your Honor, it is a very slight difference. [94] I do not see why there should be any difficulty among counsel in agreeing upon the facts of this case. I suppose to show, if your Honor, please, that there was no investigation of any kind in so far as the foreman of the Grand Jury was aware of at the time that this subpoena was issued and the production of these books was called for.

The COURT.—Counsel has expressed a willing-

ness to admit that.

Mr. SULLIVAN.—We admit that.

Mr. STANLEY MOORE.—And there was no idea, so far as the foreman of the Grand Jury is aware, of preferring further indictments against anyone at this time.

Mr. SULLIVAN.—So far as he knows?

Mr. STANLEY MOORE.—Yes.

Mr. SULLIVAN.—We admit that. We did not apply to him.

The COURT.—Counsel has admitted everything the witness might testify to:

Mr. STANLEY MOORE.—Will it be admitted, further than that, that if such a matter had been taken up with the Grand Jury, they would have been appraised of that fact through the medium of their foreman?

Mr. SULLIVAN.—Certainly not.

Mr. STANLEY MOORE.—Then there is some disposition, or apparently there might be an argument made here as to the sufficiency of this proof. We have called for the most appropriate member of the Grand Jury we could think of. The matter is immaterial to us except so far as the question of time is concerned.

The COURT.—I understand that, but it seems to me they have admitted everything that this witness can with any reason be expected to know. I do not desire to shut you off from any showing you wish to make. I cannot conceive of anything this [95] witness can testify to that has not been admitted by counsel. Counsel has admitted that so far as this witness is

concerned all that you claim is true.

Mr. STANLEY MOORE.—Mr. Sullivan, would you make this admission, simply as going to the completeness of our evidence here a showing in this behalf, the foreman of the Grand Jury being here available; will you admit that as to the remaining members of the Grand Jury there was no statement by you that the Government desired the Grand Jury to take up or consider an investigation having in view the presentation of further indictments as against these defendants or any other individuals connected with the Western Fuel Company?

Mr. SULLIVAN.—Yes, we will admit that. That is correct.

Mr. KNIGHT.—Q. Mr. Hanify, at all times mentioned in these subpoenas you were the foreman of the Grand Jury and in attendance and presided over its deliberations?

Mr. SULLIVAN.—It seems to me our admissions are very broad and complete. I do not think it is necessary to go into the secrets of the Grand Jury. I don't think this witness has a right to testify.

The COURT.—Yes, it has been assumed that he was the foreman of the Grand Jury.

Mr. KNIGHT.—And that he was in attendance?

Mr. SULLIVAN.—Yes, that he was in attendance.

The COURT.—You may now proceed with your arguments.

(Here followed the arguments on the law by the respective counsel.)

[Endorsed]: Petition. Filed September 10, 1913.
W. B. Maling, Clerk. [96]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Order Denying Application for Writ of Habeas Corpus.

Upon reading and filing the application of the above-named David C. Norcross for writ of *habeas corpus*, and due cause therefor appearing, IT IS HEREBY ORDERED that said application be and the same is hereby denied.

Dated September 10th, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [97]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Petition for Appeal.

The said David C. Norcross, by his attorneys, Samuel Knight and Stanley Moore, feeling himself aggrieved by the order and judgment entered on the 10th day of September, 1913, in the above-entitled proceeding, does hereby appeal from said order to the Circuit Court of Appeals for the Ninth Circuit,

and prays that his appeal may be allowed and that a transcript of the record and proceedings and papers upon which said order is made, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit of the United States.

SAMUEL KNIGHT,

STANLEY MOORE,

Attorneys for David C. Norcross.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [98]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of Application of DAVID C. NORCROSS, Respondent, for Writ of Habeas Corpus.

Assignment of Errors.

The respondent in this action, in connection with its appeal herein, makes the following assignment of errors, in the decision of said District Court:

1. The Court erred in rendering and entering its final judgment and order adjudging said respondent to be in contempt of said court and imposing imprisonment therefor.

2. The Court erred in holding and deciding that it had jurisdiction to make and enter the final judgment and order hereinbefore referred to.

3. The Court erred in holding and deciding that the presentments of the Grand Jury herein, or either of them, stated facts sufficient to authorize the said

Court to adjudge said respondent herein to be guilty of contempt of said court.

4. The Court erred in not holding and deciding that said respondent was not guilty of contempt of said court.

5. The Court erred in not holding and deciding that it had no jurisdiction under the Constitution and Laws of the United States, by reason of any of the matters or things contained and set forth in said presentments or reports of said Grand Jury, or either [99] of them, to entertain any charge or charges of contempt against said respondent.

6. The Court erred in holding and deciding that there was a cause, action or charge of any kind against any party whatsoever, before said Grand Jury, at any of the times set forth in said presentments or either of them or at the time said respondent appeared before said Grand Jury, and in holding that there was such a cause, action or investigation then pending before said Grand Jury, as entitled the latter to require said respondent to testify or give evidence or produce before said body any books, papers or documents that were called for by it.

7. The Court erred in not holding and deciding that said Grand Jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation set out in said presentments to said Grand Jury, and in seeking to compel said respondent to give evidence before it or to produce before it said books, papers and other documents named in the *subpoena duces tecum* theretofore served upon this respondent.

8. The Court erred in not holding and deciding that at all of the times mentioned in said presentments or either of them and at the time said respondent was required to appear before said Grand Jury, and requested to then and there testify and produce said books, papers or other documents, there was no specific charge against any particular person, firm, association or corporation, nor any specific charge against any person, firm, association or corporation then unknown, nor charge against any specific person, firm, association or corporation, and that there was then and there no presentment, indictment or any other charge against any person, firm, association or corporation, pending before said Grand Jury, either initiated by it of its own knowledge, or on information obtained by it, or upon [100] the knowledge or information obtained by any of its members, or instituted by the United States, or by anyone acting on its behalf, and in further not holding and deciding that at such time said Grand Jury had no reason to believe that a crime had been committed, for which said Grand Jury had not presented an indictment against all persons, firms, associations or corporations alleged or believed to have committed said crime or to have been connected therewith.

9. The Court erred in not holding and deciding that inasmuch as this respondent, at the time he attended before said Grand Jury and was examined and requested to produce said books, papers or other documents, as aforesaid, was not apprised of the name or names of any party with respect to whom

he was being called to testify or to produce said books, papers or other documents, and inasmuch as he was not informed of the nature of the charge pending against any person, firm, association or corporation, and inasmuch as he was not advised that any cause, proceeding or investigation whatsoever was pending before said Grand Jury at said time, against any party whatsoever, he was not compelled to testify thereat, nor to produce any of said books, papers, or other documents, and was not in contempt of court in failing to so testify and to produce said books, papers or other documents.

10. The Court erred in not holding and deciding that the *subpoena duces tecum* which was served upon this respondent on the 14th day of August, 1913, was and is invalid inasmuch as it did not specify that any cause, proceeding or investigation was then pending before said Grand Jury, or that he was required to testify and produce said books, papers and other documents before said Grand Jury in any action, proceeding or investigation whatsoever then pending before it.

11. The Court erred in not holding and deciding that this respondent was not obliged to obey said *subpoena duces tecum* [101] inasmuch as there was no order made by any Judge of said District Court or other Judge for the issuance of said *subpoena duces tecum*, and inasmuch as no application therefor was ever made to said or any Judge.

12. The Court erred in not holding and deciding that said *subpoena duces tecum* constituted and constitutes a violation of the Fourth Amendment to the

Constitution of the United States and of this respondent's right thereunder to be secure in his person, house, papers and books against unreasonable search and seizure.

13. The Court erred in not holding and deciding that said *subpoena duces tecum* constituted and constitutes in effect a warrant and search for and seizure of the papers therein mentioned, and not being issued upon probable cause or supported by oath or affirmation, and failing utterly to describe the place to be searched or the things to be seized constituted and constitutes a violation of said Fourth Amendment.

Wherefore this respondent prays that the judgment of said District Court may be reversed.

SAMUEL KNIGHT,

STANLEY MOORE,

Attorneys for Defendant.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [102]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Order Allowing Appeal and Admitting Petitioner to Bail.

Now, to wit, on the 10th day of September, 1913,
IT IS ORDERED that the appeal of the hereinbe-

fore mentioned David C. Norcross in the above-entitled matter be allowed as prayed for, and it is further ordered that said petitioner, David C. Norcross, at any time pending said appeal, be enlarged upon executing a recognizance with sureties in the sum of Five Thousand Dollars, to the satisfaction of the clerk of this court, for his appearance to answer the judgment of the Circuit Court of Appeals for the Ninth Circuit, and upon failure thereof to give appeal, remain in the custody of the United States Marshal.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [103]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of the Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Citation on Appeal—Copy.

The United States of America,—ss.

To the United States, Greeting:

WHEREAS the above-named David C. Norcross has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from an order made in the above-entitled matter on the 10th day of September, 1913, by the District Court of the United States for the Northern District of California, First Division;

You are therefore hereby cited to appear before said United States Circuit Court of Appeals, Ninth Circuit, at the City and County of San Francisco, State of California, on the ninth day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City and County of San Francisco, State of California, in the Ninth Judicial Circuit, this 10th day of September, 1913.

M. T. DOOLING,

Judge of the District Court of the United States, for the Northern District of California.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [104]

In the District Court of the United States, in and for the Northern District of California, Division No. 1.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, David C. Norcross, as principal, and Globe Indemnity Company, a corporation of the State of New York, as surety, are held and firmly bound unto the United States, appellee herein, in the full and just sum of Five Hundred (\$500) Dollars, to be paid to the said appellee, its certain attorneys and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and adminis-

trators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 10th day of September, 1913.

Whereas, lately, at a District Court of the United States, in and for the Northern District of California, Division No. 1 in a suit or proceeding depending in said court between said appellant and appellee, a judgment was rendered against said appellant, David C. Norcross, and said appellant having duly appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to [105] reverse the judgment in the aforesaid suit, and a citation directed to the said United States citing and admonishing it to be and appear at a session of the said United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, State of California, in said Circuit, on the ninth day of October next.

Now, the condition of the above obligation is such that if the said appellant, David C. Norcross, shall prosecute said appeal to effect and answer all damages and cost, if it fail to make the said plea good, then the above obligations to be void; else to remain in full force and virtue.

DAVID C. NORCROSS,

GLOBE INDEMNITY COMPANY,

By JOY LICHTENSTEIN,

Attorney in Fact.

Approved by

[Seal]

M. T. DOOLING,
Judge.

O.K.—M. I. SULLIVAN,
THEO. J. ROCHE.

Sept. 10, 1913.

Acknowledged before me the day and year first
above written.

W. B. MALING, [Seal]

United States Commissioner for the Northern Dis-
trict of California.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [106]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,462.

In the Matter of Application of DAVID C. NOR-
CROSS, for Writ of Habeas Corpus.

No. 5,325.

UNITED STATES,

Plaintiff,

vs.

DAVID C. NORCROSS,

Defendant.

No. 5,324.

UNITED STATES,

Plaintiff,

vs.

WESTERN FUEL COMPANY, a Corporation,
Defendant.**Stipulation Re Evidence on Appeal.**

IT IS HEREBY STIPULATED by and between the parties hereto, and their respective counsel, that the record of the above-entitled case No. 15,462 may be deemed to be the complete record in the above-entitled cases No. 5,325 and No. 5,324, and that the writ of error in each of the two cases last mentioned may be heard and decided upon the record presented in the case No. 15,462 first above entitled, unless otherwise ordered by the Circuit Court of Appeals.

IT IS FURTHER STIPULATED THAT the said petition for writ of *habeas corpus*, with its respective exhibits attached thereto in said case No. 15,462, and the order denying same, together with the [107] appeal, order allowing same and providing for bond, assignment of errors and citation constitute the entire record on appeal therein, and on which the said District Court acted, and include all papers, testimony and proceedings in said case No. 15,462 filed, taken and had in this court, and that said appeal may be heard and decided upon the said record, papers, testimony and proceedings as so presented, without the necessity of issuance of writ of

certiorari by said Circuit Court of Appeals, or other means of bringing said record to said Circuit Court of Appeals.

Executed in triplicate.

MATTHEW I. SULLIVAN,
THEO. J. ROCHE,

Special Assistants Attorney General for United States, Respondent Herein.

SAMUEL KNIGHT,
STANLEY MOORE,

Attorneys for D. C. Norcross and Western Fuel Company, Appellant and Plaintiffs in Error, Respectively.

So ordered.

M. T. DOOLING,
District Judge.

15 October, 1913.

[Endorsed]: Filed Oct. 15, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [108]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,462.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Order Extending Time to File Record, etc.

Good cause therefore appearing, it is, on motion of Samuel Knight, one of the attorneys for the petitioner above named,

ORDERED that the time of said petitioner within

which to file and docket the record in the Circuit Court of Appeals on his appeal herein is hereby extended from October 9th to and including October 15th, 1913.

Dated San Francisco, California, October 8th, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 8, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [109]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,462.

In the Matter of the Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Order Extending Time in Which to File Transcript on Appeal.

Good cause appearing therefor, it is hereby ordered that the Clerk of the above-entitled court have further time in which to prepare the transcript on appeal in the above-entitled case, to wit, to and including the 18th day of October, 1913.

Dated: San Francisco, October 15, 1913.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Oct. 15, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [110]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Admission of Service of Petition, etc.

Receipt of the following papers herein is hereby admitted, this 13th day of September, 1913.

Petition for writ of *habeas corpus*.

Order denying writ of *habeas corpus*.

Appeal from order denying writ of *habeas corpus*.

Citation.

Assignment of Errors.

Order Allowing Appeal and Fixing Amount of Bail Bond.

Cost Bond and Bail Bond.

Dated: San Francisco, Cal., September 13th, 1913.

M. I. SULLIVAN,

THEO. J. ROCHE,

Per A. M. J.,

Assistant Attorneys General.

[Endorsed]: Filed Sep. 16, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [111]

Certificate of Clerk U. S. District Court to Transcript of Record on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 111 pages, numbered from 1 to 111, inclusive, contain a full,

true and correct transcript of the record, proceedings and files "In the Matter of the Application of David C. Norcross for Writ of Habeas Corpus," number 15,462, as the same remain of record and on file in the office of the Clerk of said District Court; prepared in accordance with the praecipe of the attorney for appellant, a copy of which praecipe is contained in the foregoing record.

Annexed hereto is the original Citation on appeal herein.

I further certify that the cost of preparing and certifying this record amounts to the sum of \$55.10; and that the same has been paid by the attorney for appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of October, A. D. 1913.

[Seal] WALTER B. MALING,
Clerk United States District Court, Northern Dis-
trict of California.

By Lyle S. Morris,
Deputy Clerk. [112]

[Citation on Appeal (Original).]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

In the Matter of the Application of DAVID C.
NORCROSS for Writ of Habeas Corpus.

The United States of America,—ss.

To the United States, Greeting:

WHEREAS, the above-named David C. Norcross has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from an order made in the above-entitled matter on the 10th day of September, 1913, by the District Court of the United States for the Northern District of California, First Division;

You are therefore hereby cited to appear before said United States Circuit Court of Appeals, Ninth Circuit, at the City and County of San Francisco, State of California, on the ninth day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City and County of San Francisco, State of California, in the Ninth Judicial Circuit, this 10th day of September, 1913.

M. T. DOOLING,

Judge of the District Court of the United States for
the Northern District of California. [113]

[Endorsed]: No. 15,462. In the District Court of the United States, Northern District of California, First Division. In the Matter of the Application of

David C. Norcross, for Writ of *Habeas Corpus*. Citation. Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [115]

[Endorsed]: No. 2329. United States Circuit Court of Appeals for the Ninth Circuit. David C. Norcross, Appellant, vs. The United States of America, Appellee. In the Matter of the Application of David C. Norcross for a Writ of *Habeas Corpus*. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed October 18, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

DAVID C. NORCROSS,	}	No. 2329
vs.		
UNITED STATES OF AMERICA,		
	<i>Appellant,</i>	
	<i>Appellee.</i>	

In the Matter of the Application of David
C. Norcross for Writ of Habeas Corpus.

DAVID C. NORCROSS,	}	No. 2328
vs.		
UNITED STATES OF AMERICA,		
	<i>Plaintiff in Error,</i>	
	<i>Defendant in Error.</i>	

WESTERN FUEL COMPANY	}	No. 2327
(a corporation),		
	<i>Plaintiff in Error,</i>	
	<i>Defendant in Error.</i>	

ORAL ARGUMENT OF SAMUEL KNIGHT.

May it please the Court:

In this case appellant, who was secretary of Western Fuel Company, was adjudged guilty of contempt of the

court below in refusing to produce the books, records and papers of the Western Fuel Company in response to a subpoena *duces tecum* which had been theretofore served upon him, and of an order of the court subsequently made in pursuance of such subpoena commanding him to produce these documents.

After the court had adjudged appellant guilty of contempt of court and had sentenced him to be imprisoned until he should have produced the books, papers and documents called for by the subpoena *duces tecum*, appellant petitioned the same court for a writ of habeas corpus, which was denied, and from the order denying such application he has taken an appeal to this court. He has also prosecuted a writ of error from the final order or judgment adjudging him to be in contempt of court.

At the same time and for similar reasons the Western Fuel Company was also adjudged guilty of contempt of court for refusing to produce the same books, papers and other documents, and was sentenced to pay a fine of \$2000. From this final judgment or order the Western Fuel Company has also prosecuted a writ of error to this court.

Inasmuch, however, as these cases were heard together in the court below, it has been stipulated by counsel for all parties that, unless this court shall direct otherwise, the record of the case which comes to this court on appeal and which has been printed and is in the hands of the court might be deemed to be the complete record in each of the cases in which a writ of

error was taken, and that the writ of error in each of the two cases last mentioned might be heard and decided upon the printed record.

Inasmuch as the petition for writ of habeas corpus, together with its exhibits, sets forth all of the proceedings taken before the court below, including all orders made and testimony taken and matters presented by the grand jury, as well as the subpoena *duces tecum* itself, it was further stipulated that this petition for the writ of habeas corpus with its exhibits, and the order denying the petition, together with the papers necessary to perfect the appeal, constituted the entire record of the case upon which the court below acted, and that the appeal might be heard and decided upon this record without the necessity of the issuance of a writ of *certiorari* to bring the record to the court of appeals.

It may be remarked, parenthetically, that the various methods adopted here for review of these cases have been employed recently in similar cases before the Supreme Court of the United States, e.g., in *Wilson v. United States*; *Wheeler v. Same*; *Shaw v. Same*; to all of which attention will be hereafter called in another connection; a writ of error, as the court knows, bringing up matters for review which could not be reached by an appeal from an order denying a writ of habeas corpus. But we believe that the action of the learned court below complained of by us can be re-examined here almost as effectively under the one procedure as under the other, inasmuch as it is our contention that the trial court lacked jurisdiction to make the order or

judgment in question, and lacked jurisdiction to punish either appellant and plaintiff in error Norcross, or plaintiff in error Western Fuel Company, for his and its refusal to produce the books, records and other papers called for by the subpoena *duces tecum*.

However, such errors as we complain of that cannot be examined by this court on appeal can be corrected under the writ of error taken in the Norcross case, and also in the case of the Western Fuel Company; so that it is really immaterial whether or not the learned court below lacked jurisdiction to enforce the subpoena *duces tecum*, or merely erred in sustaining it and in finding plaintiff in error guilty of contempt under the presentment of the grand jury and citation issued in pursuance thereof. For that reason we will discuss the cases together without regard to the method by which this court may review the action of the court below.

THE RECORD.

The further facts of the case as disclosed by the record are these: On the 14th day of August, 1913, appellant Norcross, who was and is secretary of Western Fuel Company, was served in his official capacity as such secretary with a subpoena *duces tecum* commanding him to produce before the grand jury, at 2 o'clock in the afternoon of that day, virtually all of the books, records, papers and vouchers of Western Fuel Company showing the business done by that company from the first day of January, 1904,—virtually when it commenced business,—and first day of May, 1906, respectively, to the date of the subpoena; also all the

weekly, monthly and yearly financial and other reports made to the directors of the Company, minute books containing the minutes of the meetings of directors, minutes of meetings of stockholders between the first day of January, 1904, and the date of the subpoena; also all the stock ledgers, stock journals, ledgers, stock certificate books and cash books showing the business transacted between these dates. As I shall shortly show, the demand thus made covered virtually all of the records of every character possessed by the Western Fuel Company and covering its entire business for the past eight or ten years, and was, therefore, most sweeping in character. The subpoena did not allege that there was any proceeding whatsoever pending before the grand jury, and, in fact, before appellant attended before the grand jury he was told by a special agent of the treasury department, who had in charge the investigation which had resulted in the indictment of various directors and officers of the Western Fuel Company, that the demand for these records was not made for the purpose of bringing further indictments, but only because the government did not get the company's records prior to 1906; and in an apparently authorized newspaper interview one of the special counsel for the government stated that the object of the proceeding before the grand jury was "to gather evidence to be used in the coming trial of the eight officials who were indicted on the charge of conspiracy." The company had previously furnished the government with all of its records which the latter had asked for. It will further appear as a fact that no

proceeding was then pending before the grand jury either presented to it by the district attorney or by special counsel for the government, or initiated by the grand jury of its own motion, and no order or application of any kind had ever been made to any member of the court below for the subpoena in question, or for any subpoena *duces tecum* calling for the production of any of these books, papers or records.

The true reason for the government's desire to obtain these papers and records of the Western Fuel Company is found in the fact that in the November, 1912, term of court two indictments had been presented against the officers and certain employes of the Western Fuel Company, and a third indictment had been presented during the March, 1913, term of court, all of these indictments being virtually identical, the first indictment charging conspiracy to defraud the United States formed on the first day of January, 1904, the second indictment charging the same offense, dating the conspiracy from the first day of April, 1906, and the third and last indictment charging the same offense, dating the conspiracy from the first day of April, 1906; and this last indictment was apparently also designed to correct the former indictments in some respects. And at the time appellant was served with the subpoena *duces tecum* the trial of the defendants under one of the indictments had been set for less than two weeks later, i.e. the 26th day of August, 1913.

The court will particularly note this date as bearing with considerable importance upon the reasonableness

of the grand jury's demand. At the instigation probably of the special agent of the treasury department, at least by some official connected with the case, the grand jury postponed this mysterious investigation to which special counsel for the government referred (page 92 of the record) until just before the trial under one of the indictments was to take place, when this dragnet inquiry was instituted apparently for no other purpose than not only to furnish the government with whatever ammunition the books and documents might supply, but also to keep the defendants from properly preparing their case by taking from them their own records when they were most needed.

At the time last mentioned the trial was further postponed until the 13th day of October, 1913, and since that time the trial of the case has been further continued, at the instance of the prosecution, until the first day of next December, for the avowed purpose of obtaining, if possible, a decision of this court on the matter now under consideration prior to the time when the case would be reached for trial. The court will recall that when application was made by the government's counsel on the day the record was filed in this court to have this case heard before the present term expired, it was stated as the reason for the application that the trial of the case in the district court had been postponed to await the determination by this court of the matter now under consideration; and when the government made its application for continuance of the case from the 13th of October, it was given as a reason not only that the engagements of the government's

counsel were such as to make it inconvenient to try the case at the time last named, but also that it required for preparation of its case the books and papers of the Western Fuel Company which the latter and its secretary had refused to produce.

It may be further said that a subpoena *duces tecum* has been served upon appellant to produce the books, papers and records of the Western Fuel Company at the time of the trial, and it has been repeatedly stated to the court below and to counsel that the papers and records thus called for would be here in San Francisco and accessible upon proper process at that time.

The court will bear in mind that this is an application to have these records produced, not before the trial court, but before the grand jury, in order to enable the government by a fishing expedition to endeavor, if possible, to strengthen its case, as it is apparently entirely dissatisfied with the case that had been heretofore presented to the grand jury.

Acting under the advice of counsel, appellant, while personally attending before the grand jury, and after being sworn, declined to comply with the demand contained in the subpoena *duces tecum*. He assigned a general reason for his refusal, which the Supreme Court of the United States has held in *Hale v. Henkel*, to which attention will be hereafter directed, entitles him to rely upon whatever legal rights he has. The matter was presented by the grand jury to the learned court below on the afternoon of the 14th of August, and on this presentment or report a

citation was issued and served upon appellant on the 16th of August commanding him, as secretary of the Western Fuel Company, to show cause on the 18th of August why he should not be adjudged guilty of contempt of court in failing to comply with the demand above referred to. At the date last mentioned appellant showed cause why he should not produce these books, papers and records not only by two affidavits of his which were read in evidence, but also by certain admissions made by special counsel for the government, who are conducting this case, by the subpoena itself, by the presentment of the grand jury upon which the citation was issued, and by the testimony of the foreman of the grand jury, to all of which I will more particularly call the court's attention in discussing the grounds upon which we believe appellant was justified in refusing to obey the subpoena *duces tecum*. The learned court below, however, held appellant's showing to be insufficient and directed him to produce the books, papers and records in question, and for the latter's continued refusal so to do, adjudged him guilty of contempt and directed that he be imprisoned in the county jail of Alameda County until he obey the subpoena in question.

For similar reasons and at the same time and by the same proceeding the Western Fuel Company was adjudged guilty of contempt and fined in the sum of \$2000 for failing to produce the same books, papers and records; and, as before stated, with the consent of the court, the rule made applicable in the case of

Norcross will also govern the case of the Western Fuel Company.

Points and Authorities.

We contend that the learned court below was without jurisdiction to adjudge appellant guilty of contempt of court, and that the subpoena *duces tecum* in question was void for the following reasons—and I do not mention these objections in the order of their importance, but in the order in which they should be logically presented to the court:

First: There was no order of, or application to, any court or judge for the issuance of the subpoena *duces tecum*.

Second: The subpoena does not state that there was any proceeding of any character pending before the grand jury for which the attendance of the witness, or the production of the books, papers and documents called for was required. No reference is made in the subpoena to any proceeding whatsoever before the grand jury.

Third: No charge of any kind whatsoever had been presented by special counsel for the government, or by the district attorney, to the grand jury, nor was any charge then pending against anyone, or any investigation in any way, directly or indirectly, requiring the books, papers and records, or any of them, specified in the subpoena *duces tecum*, or in which any of these books or records could furnish any evidence,

nor had the grand jury before it, of its own initiation, any proceeding of any kind whatsoever involving any matter or thing referred to in the subpoena. In other words, the grand jury was being used as an adjunct of the office of the district attorney for the purpose of obtaining evidence for use in the pending trial to which I have just referred.

Fourth: Even if the subpoena *duces tecum* were legally issued, nevertheless the demand contained in it was so broad and sweeping as to constitute an unreasonable search and seizure within the meaning of the fourth amendment of the Constitution of the United States; and

Fifth: Nowhere in the record does it appear that the documents and books called for by the subpoena *duces tecum*, assuming it to have been legally issued, were, nor was any of them, material or relevant to any charge or investigation before the grand jury, even if one was then pending, and, therefore, there was no showing sufficient to entitle the learned court below to adjudge the appellant in contempt.

These objections are inter-related and serve to explain each other, as the court will notice in examining several of the decisions to which I propose to call attention.

THE ISSUANCE OF THE SUBPOENA DUCES TECUM WAS NOT PROPERLY AUTHORIZED.

The first reason assigned by us for maintaining that the subpoena was void is that it was not properly authorized or issued.

Hence appellant and plaintiff in error Norcross was deprived of his liberty and plaintiff in error Western Fuel Company was deprived of its property without due process of law, contrary to the fifth amendment to the Constitution.

The general power to issue a subpoena *duces tecum* is found in section 716 of the Revised Statutes, which was originally enacted in the act of Sept. 24, 1789, Ch. 20, 1 Stat. L., 81, and in the act of March 2, 1793, Ch. 22, 1 Stat. L., 334, which invests the Supreme Court and the Circuit and District Courts with power to issue writs of *scire facias*, and also

“all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.”

The court will recall that the fourth amendment to the Constitution to which we shall have occasion to refer again, and somewhat more at length, provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Supreme Court of the United States has likened a subpoena *duces tecum* to a search warrant. It was so held in

Boyd v. U. S., hereafter referred to; and
Hale v. Henkel, also cited later.

It is also similar, in effect, to a notice to produce under sec. 724 of the Revised Statutes.

Cons. Rendering Co. v. Vermont, 207 U. S., 541,
52 L. Ed. 327, 334,

and, in a way, to a bill of discovery in equity. Their object is the same and they accomplish virtually the same result. A subpoena *duces tecum* compels a person upon whom demand is made to produce before a grand jury, or examining magistrate, or in court, papers or documents in his possession or under his control, thereby constituting it a search with respect to such papers and documents and when sequestered or impounded likewise becomes a seizure. It makes no difference in point of principle whether these papers and documents be produced by the person who has control of them pursuant to compulsory process, such as by a subpoena *duces tecum*, or notice to produce, or as the result of a decree on a bill of discovery, or whether the place where they are kept be searched by an officer of the government and the papers obtained in that way; the result is the same. The papers are produced and used by the government or party at whose instance they are obtained, for such purposes and in such ways as the law permits. The point is that no matter what may be the form of process, it can only be authorized by the court upon an application or showing which shall disclose, among other things, the pendency of a legal proceeding or of an investigation by or before a magistrate or body authorized to conduct it, and that the books and papers desired are relevant and material to that proceeding or investigation.

And so the proper practice is for a clerk of court to issue a subpoena *duces tecum* only upon the authority of a court or judge thereof. Sec. 869 of the Revised Statutes requires it under a *dedimus potestatem* before a commissioner. Why should not a similar order be required where the documents are to be produced before a grand jury?

In the Wilson case, to which attention will be hereafter called, it was stated as one of the many reasons why Wilson's imprisonment was illegal that the subpoena *duces tecum* was not issued pursuant to an order of court, but the record is silent on the subject; nor was the point discussed or referred to by counsel on either side or adverted to in the opinion. Apparently the record in that case did not give opportunity to insist upon the objection.

In the case of

Dancel et al v. Goodyear Shoe Machinery Co.,
128 Fed., 753,

Judge Colt, circuit judge for the district of Massachusetts, had occasion to consider the practice as to the issuance of a subpoena *duces tecum* in connection with the taking of depositions *de bene esse*. In that case a petition had been made to the court for an order directing the clerk to issue a subpoena *duces tecum*, and opposition to the granting of the petition was made on several grounds. The decision is a somewhat lengthy one in which Judge Colt has reviewed a number of

authorities bearing upon various phases of the subject, saying in part (p. 756):

“It is further contended that it is the universal practice outside of the district of Massachusetts for the clerk of the court to issue a subpoena *duces tecum* as of course. There is no authority cited which supports this proposition. This will appear from an analysis of the cases upon which the petitioners rely.”

Then follows the citation of a number of cases which the court reviews.

In speaking of the case of

U. S. v. Tilden, 10 Ben. 566, Fed. Cas. No. 16,522, Judge Colt says (p. 757):

“It will be noticed that the court did not hold that it had the power by a subpoena *duces tecum* to call for the production of any papers, but only those which would be competent evidence in the case. It followed necessarily, from this limitation of the court’s power, that a subpoena *duces tecum* should not issue as of course, but only under some restrictions, such as a prior investigation into the materiality of the evidence called for; and the court so held.”

Judge Colt then further quotes the language of the court in that case as follows, which is also applicable to our objection that the demand contained in the subpoena is unreasonable:

““But it certainly is a startling, and, I believe, a novel, proposition that a merchant, or broker, or banker may be subpoenaed to produce all his books of account and all his business papers during a period of 10 years, as was substantially attempted in this case, upon a mere possibility that out of

this mass of books and papers some might be found whereby he could refresh his memory if it should, upon his examination, appear that his memory needed refreshing on some point on which he should prove to be able to give testimony competent in the cause. No precedent is produced for this exercise of power, nor has any statute or decision been found or cited which appears to recognize or authorize the compulsory production of books and papers for such a purpose; the same not being relevant or material to the cause. * * *

It has been well pointed out that in such examinations, on account of the limited power of the examining magistrate, persons summoned for such examination have less chance of protection against the oppressive and injurious use of this power of the court than upon a trial in court, where all questions arising can be submitted to and decided by the court as they arise; and I am satisfied that the statute in question does not require a construction permitting such a compulsory production of a witness' books and papers. A very strong, if not a controlling argument in support of this view is to be drawn from the terms of the statute of 1827 (Rev. St. secs. 868, 869 [U. S. Comp. St. 1901, pp. 664, 665]), above referred to. In providing for the regulation of this very matter in examinations under a commission or *dedimus potestatem*, it expressly limits the compulsory production of books and papers to such only as would be, "if produced, competent and material evidence for the party applying therefor." This is a legislative declaration of the highest possible character, as it seems to me, that this was as far as the policy of the law goes in the matter of compelling the production of books and papers on the examination of witnesses out of court, and all that substantial justice requires in this direction, having a due regard to the rights, the convenience and the interests of other persons, as well as of the parties litigant. No reason can well be imagined for sup-

posing that Congress would withhold from this class of examinations under commission, where the commissioners are appointed by the court, and the mode of interrogation is prescribed before the examination under the direction of the court itself, as full an authority to compel the production of books and papers by the witness as is allowed on an examination *de bene esse*, which is subject to less restriction and supervision. This act, therefore, seems to show that Congress understood that this was the limit allowed for the compulsory production of books and papers under the system of examinations *de bene esse* then in force.' "

Judge Colt then said:

"This sound reasoning fully covers the point under consideration, and is directly opposed to the petitioners' position."

If it may be said that persons summoned for such examination before an examining magistrate have a less chance of protection against the improper use of the power of the court to compel the production of evidence than upon a trial in court where they are represented and where the relevancy or materiality of evidence can be then passed upon, it may be said with equal truth, or greater force, that a person summoned to give such evidence before a grand jury is equally or more completely unprotected, particularly so as the proceeding is there *ex parte*, wholly conducted by the government, before no magistrate competent to rule upon the admissibility of evidence, and with no counsel present to represent the witness.

Judge Colt further refers to the case of

Edison Electric Light Co. v. United States Electric Light Co., 44 Fed. 294; 45 Fed. 55,

where the officers of one of the parties were adjudged in contempt for failing to obey a subpoena *duces tecum* apparently properly obtained by defendant, and said (and I may here say that much in Judge Colt's opinion and in the cases he cites sustains our fourth contention that the subpoena in question is too sweeping in its demand to be reasonable) (p. 759):

“The defendant is not ‘claiming the right to a general inquisitorial examination of all the books papers, and documents of his adversary, with the view to ascertain if, perchance, something may be found which will possibly aid it’; nor is it asking ‘before the hearing to pry into the case of its adversary,’ nor ‘to see in advance of the trial evidence which the other side are going to produce,’ nor ‘calling upon its adversary to exhibit for inspection anything and everything in writing under the latter’s control, which may assist the defendant’; nor is this an ‘unnecessary inquisition into the contents of private papers by one who has no interest in them.’ No ‘complete disclosure of everything the complainant knows or believes in relation to the matter in question’ is sought for, nor is this a ‘general fishing excursion’. A particular document, whose existence is well known to both parties, and in fact to the general public, is specifically called for. It is described with a fullness (by date, description, and serial number) which leaves no doubt as to its identity. * * *”

Said Judge Colt further in the course of his opinion (pp. 760-761):

“From this review of the cases relied upon by the petitioners, I find nothing to support or war-

rant the practice that a party may apply to the clerk for a subpoena *duces tecum* under section 863 to take testimony *de bene esse* before a notary public, and may, in his discretion, either fill in himself, or ask the clerk to fill in, a direction to the witness to produce before the magistrate whatever books and papers he sees fit to call for, and that the witness is bound to produce them at the time and place named, or render himself liable to punishment for contempt. Such a practice, in my opinion, would be a violation of the spirit, if not of the letter, of the constitutional provision which secures to the individual protection against unwarrantable searches and seizures of his private papers, and of the legislative expressions of Congress as embodied in the statutes relating to this subject, as well as of the general rule, which the courts have ever adhered to, of guarding witnesses against the unnecessary production and inspection of their private papers. It is to be borne in mind, in this connection, that the compulsory production of books and papers in court, where all questions as they arise can be submitted to and decided by the court, is very different from their compulsory production before a notary public under section 863, or an examiner under equity rule 67, where the magistrate has little power to afford protection to the witness. In the latter instance the practice cannot but lead to abuse, oppression and injustice. The case at bar affords a good illustration of the evils which would result. We have here a subpoena *duces tecum*, signed by a notary public, directing the two witnesses named to produce before him substantially all the books of every nature of three corporations.

“A party undoubtedly has the right to invoke the process of the court to compel the attendance of witnesses and the production of such papers as are material to his case; but neither the right of a party nor the power of the court extends beyond this. A party has no right, and the court has no

power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case. Any practice which sanctions such a proceeding is unwarranted, and an infringement upon a fundamental personal right guaranteed by the federal Constitution. The courts have always recognized this protection to the individual, secured by our organic law. Such recognition is seen in the distinction which is made between a subpoena *ad testificandum* and a subpoena *duces tecum*. *The former is a process of right, while the latter is addressed to the discretion of the court.* [Italics ours.] Discretion here does not mean that the court has power to refuse the compulsory production of a paper which is material evidence in the case, but that, *before compelling its production by a subpoena duces tecum, it will sufficiently inquire into the matter to determine if the evidence appears to be material, and, if not satisfied on this point, will decline to issue the writ.*

“An important discussion of this subject is found in the report of the trial of Aaron Burr. The counsel for the defendant in that case moved the court for a subpoena *duces tecum*, directed to the President of the United States, calling for the production of certain papers. Mr. Wirt, in opposing the motion, said:

“ ‘The subpoena *ad testificandum* is a matter of right, and the prisoner might have demanded it from the clerk without the intervention of the court; but here is a motion for a subpoena *duces tecum*, to compel the President to produce certain papers of state, the materiality of which is not shown. I shall contend, first, sir, that the subpoena *duces tecum* is not a process of right, that the motion for it is a motion addressed to the discretion of the court, and that the court may award or withhold it as they see fit. In the next place, I shall contend that this discretion of the court

should be controlled and determined only by the relevancy and materiality of the papers required.'

"Mr. Wickham, counsel for the defendant, interrupting Mr. Wirt, said:

" 'We admit that it is an application to the sound discretion of the court.'

"Chief Justice Marshall, in deciding the motion, said:

" 'This is said to be a motion to the discretion of the court. This is true.'

"In proceeding to discuss the nature of this discretion, the Chief Justice said:

" 'But the court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material to his defense. * * * If it be apparent that the papers are irrelative to the case, or that, for state reasons, they cannot be introduced into the defense, the subpoena *duces tecum* would be useless. But if this be not apparent, if they may be important in the defense, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the accused should be denied the use of them?'

"See Robertson's Report of Burr's Trial, vol. 1, pp. 136, 137, 182, 183, 184; Dillon's John Marshall, p. xxxviii, and note. For an instructive review of this general question, see Judge Cooley's Inviolability of Telegraphic Correspondence, 27 Am. Law Reg. 65, and Hitchcock's Inviolability of Telegrams, 2 Am. Bar Ass'n Rep. p. 93.

"In all cases where Congress has legislated on this subject, it has recognized the distinction between a subpoena *ad testificandum* and a subpoena *duces tecum*, and has carefully restricted the issuance of the latter process."

Again (p. 762):

“For these reasons, I am of opinion that the settled practice of this circuit is correct, and that a subpoena *duces tecum* should not issue, either under section 863, or equity rule 67, except by order of court, upon preliminary proof that the documents called for are in the possession of the witness and are prima facie competent and material evidence in the case. The court will not finally determine the question of materiality on such application, but it must be reasonably satisfied that the evidence is relevant and material.
* * * To compel these witnesses, upon the proof submitted to bring before the examiner this mass of private books and papers, would be an oppressive, if not an unconstitutional, use of the power of the court, and an abuse of its process.”

The same observations may be properly made respecting the attempt to compel the appellant and Western Fuel Company to bring before the grand jury the mass of books and papers called for by the subpoena here under consideration.

In the case of

United States v. Terminal R. Ass'n, et al., 154
Fed. 268,

which came before the court on a motion in an equity case to quash a subpoena *duces tecum*, the court held that the order for the issuance of the subpoena was improvidently granted, and sustained the motion to quash, saying:

“That a subpoena *duces tecum* should not issue as of course, but only under some restrictions, such as a prior investigation into the materiality of the evidence called for.”

The court there refers to the case of

United States v. Hunter, 15 Fed. 712,

which involved a similar motion, and said that the judge there

“After stating what allegations are necessary in the application for the subpoena, gives the reason therefor as follows: ‘In order that the court or judge ordering the subpoena may have some means of judging the relevancy of the testimony sought’.”

The court said further (p. 272):

“That Congress, in legislating upon this subject, has carefully restricted the power of the courts to cases in which the evidence is relevant and material. * * * Seeking the production of papers and documents for the purpose of finding out whether or not they contain information valuable to the party demanding them has been aptly denominated a ‘fishing examination’, and is always regarded as oppressive, and as such denied” (citing authorities).

In the case of

American Car and Foundry Company v. Alexandria Water Company, (Pa.) 70 Atlantic 867, 128 Am. St. Rep. 749,

the court said with reference to a subpoena *duces tecum* that was there under consideration—and what was there said is again equally applicable to our contention respecting the reasonableness of the government’s demand:

“Anything in the nature of a mere fishing expedition is not to be encouraged. Where the plaintiff will swear that some specific book contains

material or important evidence, and sufficiently describes and identifies what he wants, it is proper that he should have it produced. But this does not entitle him to have brought in a mass of books and papers in order that he may search them through to gather evidence. In 23 American and English Encyclopedia of Law, second edition, 179, it is said: 'The courts uniformly decline to grant an application for production and inspection where it is merely for the purpose of a fishing examination, as where it is made to discover whether or not there is evidence contained in the documents which will be useful to the applicant, or for the purpose of determining whether he has a cause of action, or a defense, or in anticipation of a defense, or to gratify curiosity.'

"And the fair and proper rule upon the subject is also set forth in 3 Wigmore on Evidence (1904), section 2200, where it is said: 'A peculiarity of the subpoena *duces tecum* is that in the nature of things it must specify with as much precision as is fair and feasible the particular documents desired, because the witness ought not to be required to bring what is not needed, and he cannot know what is needed unless he is informed beforehand.' And in a note to above the following cases are cited: *Carson v. Hawley*, 82 Minn. 204, 84 N. W. 746 (demand for all books and papers for a business during three months held insufficient); *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426 (there must be a reasonably accurate description of the papers wanted,' and a showing that it is material in a pending cause; here, a call for all telegrams between half a dozen persons within fifteen months past was held too broad); *United States v. Babcock*, 3 Dill. 566, Fed. Cas. 14,484 ('the papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him and to have the papers on the trial, so that

they can be used if the court shall then determine that they are competent and relative evidence’).

“An order to produce all papers concerning the matter in dispute is not sufficiently specific. The papers and documents to be produced should be described with reasonable precision. An inspection of the subpoena in this case shows that the court below was fully justified in refusing to compel obedience to what was asked for. The first assignment of error is, therefore, dismissed. For the same reason the second assignment of error is overruled. It was unreasonable to ask for a blanket list of persons and firms with whom contracts had been made during the year. In the absence of all particularity in specifying what was wanted, and without any showing of materiality, the court was right in sustaining the objection to the demand for a general list of contracts with other persons.”

The court will find quite an instructive note appended to that case which asserts that in the federal courts a subpoena *duces tecum* is not a matter of right and may not be issued as such by the clerk, but only by an order of the court; and as authorities the following cases are cited:

Bentley v. People, 104 Ill. App. 353; 107 Ill. App. 245;

Duke v. Brown, 18 Ind. 111; and

Dancel v. Goodyear Shoe Machinery Co., just referred to.

It was said by Mr. Justice Hughes in the very recent case of

American Lithographic Co. v. Werckmeister, 221 U. S. 603 (55 L. Ed. p. 873),

that under the fourteenth section of the judiciary act of 1789, which is now found in sec. 716 of the Revised Statutes:

“Power was conferred upon the federal courts to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the practice and usages of law. This comprehended the authority to issue subpoenas *duces tecum*, for ‘the right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law.’ *Amey v. Long*, 9 East. p. 484. Section 724, which was originally § 15 of the judiciary act of 1789, was to meet the difficulty arising out of the rules relating to parties at common law, and to provide, by motion, a substitute *quoad hoc* for a bill of discovery in aid of a legal action” (citing further authorities).

The court said further:

“It was not the purpose of § 724 to interpose an obstacle to the exercise of the general power of the court with respect to the issuance of subpoenas *duces tecum*, and that was not its effect. The barrier, in the case of parties, existed independently of the provisions of the section, and by these it was sought to mitigate the resulting inconvenience. When, however, the rule as to parties was changed, it followed that the obstacle was removed, and by virtue of the general authority of the court, subpoenas *duces tecum* may run to parties as well as to others,—leaving those who are subpoenaed to attack the process if of improper scope or lacking in definiteness, or to assert against its compulsion whatever privileges they may enjoy” (citing further authorities).

By reason of the limited amount of time at my disposal I pass by this point without further discussion

because it is the least important point in the case and only concerns the question of procedure; for if the counsel for the government could make a proper showing to the court below that they were entitled to the subpoena *duces tecum*, that court would undoubtedly make the necessary order. There are, however, other and graver reasons militating against the validity of the subpoena in this case, and the right of the court below to order the production of the books and records there called for, each one of which seems absolutely conclusive of the correctness of appellant's refusal to recognize the process served upon him.

**THERE WAS NO PROCEEDING PENDING BEFORE THE
GRAND JURY.**

The second and third objections which I have heretofore stated to the validity of the subpoena *duces tecum* may, for the sake of brevity, be considered together. These objections are that not only does the subpoena itself fail to state that any proceeding was pending before the grand jury, but as a matter of fact there was no proceeding of any kind so pending. There was no charge against anyone under investigation by the grand jury, although one of the learned counsel for the government, at the eleventh hour on the hearing upon the citation to show cause why appellant should not be punished for contempt, endeavored to grasp at a straw and save the situation by asserting that it was the intention of the government to ascertain to what extent other unnamed parties had been

involved; but who these parties are, or what was the charge contemplated against them, was not disclosed, and it is apparent from an examination of the record and of the grand jury's presentment that this was an afterthought. The contention of the government was that it made no difference what its object was in endeavoring to obtain possession of these books and papers; that counsel was entitled to them anyway; and we submit that this court cannot, in examining the evidentiary showing made during the hearing upon the citation, reach any other conclusion than that it was an attempt by counsel for the government to embark upon a fishing expedition and use the grand jury merely, as I have said, as an adjunct of the district attorney's office in order to assist the government in the preparation of its case upon the trial under one of the indictments.

On the hearing upon the citation the following took place with respect to the pendency of a charge or investigation before the grand jury (record, pp. 80-82).

In a portion of his affidavit appellant said:

"Outside the grand jury room that afternoon I saw Mr. Tidwell, the government's special agent, and I said, 'Is this for the purpose of bringing further indictments?' He replied: 'No, this is not for the purpose of further indictments, we didn't get the records prior to 1906.' I then said, 'No, you didn't get those records because they were burned in the fire, and I told you so at the time you were making your examination.'

"The next day, August 7, 1913, Mr. Tidwell telephoned me and asked me to come down to

his office, as there were some matters he wanted to talk over with me. After I got there he stated that the place the books were wanted was in his office, as 'it would be handiest to work on them there.'

"On the next day, August 8, 1913, the following news item appeared in the San Francisco Examiner:

" 'JURY RESUMES FUEL CO. TRIAL.

"David C. Norcross, Secretary of Organization,
"Examined by Prosecutor Roche.

"The federal grand jury at its first meeting yesterday afternoon resumed the investigation of the alleged Western Fuel Company frauds. The government was represented by Theodore Roche, Esq., special prosecutor, and he spent a whole hour examining David C. Norcross, secretary of the Western Fuel Company.

"It is understood that Special Prosecutor Roche has instituted further investigations of the Western Fuel Company to gather evidence to be used in the coming trial of the eight officials who were indicted on the charge of conspiracy.'

"The contents of this item, as I am informed and believe and therefore state, were given out by, or with the consent of the special assistants to the attorney general mentioned therein. I am further informed and believe and therefore state that this article correctly states their intention in having me subpoenaed before the grand jury.

"On August 14, 1913, the subpoena specifically mentioned in the citation was served upon me. A copy of this subpoena is attached hereto and marked Exhibit 'A'. It will be observed from reading it that it does not state that there is any case or matter being investigated by the grand jury. It simply requires me to appear before the grand jury at 2 o'clock that afternoon and bring with me all the books and papers of the company of every description.

"After consulting counsel I appeared before the grand jury at the appointed time, and gave the following answer:

"Counsel have instructed me that I am not required under this subpoena, either to testify before the grand jury or to produce the books and papers of the Western Fuel Company. Accordingly, without any disrespect to the grand jury I must decline to testify further or to produce the books until the court has passed upon the matter.' * * *

"I do not believe there ever has been an intention of exhibiting these books or examining them in the presence of the grand jury or during its sessions, but I believe the fact to be, as I was informed by Mr. Tidwell, and I therefore state that what was really wanted of me was to turn the books over to Mr. Tidwell so that he might work upon them at his office." (Record, pp. 82-3.)

"Mr. KNIGHT. Will it also be admitted, Mr. Sullivan, without the necessity of calling witnesses, that some ten days ago you stated to Mr. Warren Olney, Jr., in his office, that there were no further proceedings contemplated against the parties under indictment and connected with the Western Fuel Company?

"Mr. SULLIVAN. I will state that I had a conversation with Mr. Olney about ten days ago; in response to a statement made by him that he was inclined to advise the production of books that at that time while having a conversation with him the government had no present intention of filing any further indictments against the Western Fuel Company or the defendants. That is correct, Mr. Olney, is it not?

"Mr. OLNEY. Yes, Mr. Sullivan, that was your statement to me.

"Mr. SULLIVAN. Yes, that we had then no present intention. You now claim for the first time that the time for compliance with the subpoena was too short, do you? * * * (Record, pp. 88-89.)

“Mr. KNIGHT. We want to call Mr. Hanify with reference to questions as to whether there was anything pending before the grand jury at the time that subpoena was served on Mr. Norcross, and at the time that Mr. Norcross attended.

“Mr. SULLIVAN. We consider that showing immaterial, if your Honor please. How can the grand jury know what the government intends to present?

“Mr. KNIGHT. What we want to show is that at the time that Mr. Norcross was served with a subpoena—I would suggest this, Mr. Sullivan, that you admit, subject to its materiality, that there was not at the time of the service of the subpoena on August 14th and at the time Mr. Norcross appeared before the grand jury, or theretofore, and after the last indictment had been returned against the present defendants, any proceeding pending before the grand jury or any charge before the grand jury against these defendants, or any of them.

“Mr. SULLIVAN. I will admit that there was no formal charge pending before the grand jury at the time the subpoena was served upon Mr. Norcross; but to a certain extent there was a proceeding pending before the grand jury because Mr. Norcross had attended before the grand jury on two occasions before that, and he was sworn and questioned and testified to a certain extent.

“Mr. KNIGHT. Mr. Sullivan was that proceeding anything further than merely a proceeding to obtain an examination of the books, papers and documents of the Western Fuel Company that are specified in the subpoena?

“Mr. SULLIVAN. In the first place, we consider that fact immaterial, and in the next place the government is not called upon to disclose the intention which it had when it called upon Mr. Norcross to produce the books of the Western Fuel Company.

“Mr. KNIGHT. Of course, Mr. Sullivan, we don’t ask you to waive any objection you may have as to the materiality or relevancy of that evidence. We merely want to get the fact before the court as to the fact that there was no proceeding against these defendants or any of them pending, nor had any charge been made against these defendants or any of them to the grand jury at the time of the service of these subpoenas and at the time the witness was called upon to testify in obedience to them.

“Mr. SULLIVAN. I will admit that at the time the subpoena was served there were no formal proceedings pending against the Western Fuel Company or against any of the defendants named in the indictment. That is as far as the government will go. But I will state in good faith to counsel that there are other parties involved in these frauds who have not yet been indicted. And I will state that it is the intention of the government to ascertain to what extent these other parties have been involved and if their action is criminal, then the government will take such course as it deems proper in the premises.’ But I frankly admit that when the subpoena was served the government had and at that particular time no formal charges were pending against the Western Fuel Company or against its directors, other than those charges which are now pending and appear in the indictments heretofore filed in this court.

“Mr. KNIGHT. Of course, you refer to a formal charge. I don’t know whether any distinction could be made as between a formal or an informal charge. *My point is, and I ask you to admit it if it is the fact, that at this time there was no charge that had been presented by the district attorney or by special counsel for the government against the defendants under the present indictments, or any of them, and that no charge had been originated so far as you know in the grand jury without the consent of the district attorney.*

"Mr. SULLIVAN. *We will make that admission in so far as the Western Fuel Company and the present defendants are concerned. We will not make any admission as to any others, Mr. Knight.*
* * * (Record, pp. 90-93.)

"Mr. STANLEY MOORE. If your Honor please, Mr. Hanify, the foreman of the grand jury, is in attendance now and we do not like to ask that he remain here. I think that perhaps it would save time to remove some of these questions about which argument might be made if we should just put him on the stand and let him go his way.

"Mr. SULLIVAN. What do you want to prove by him?

"Mr. STANLEY MOORE. I will call him to the stand and ask him the questions. I want to prove by him, that, as a matter of fact, there was no investigation of any kind pending before the grand jury; that this gentleman was just subpoenaed there to produce these books and papers, and there was no idea of an indictment. The idea was that you should get possession of them, or rather, Mr. Tidwell, in order that he could work on them, just as he told Mr. Norcross down in the office that day. If there is going to be any dispute about that, or any dilly-dallying or splitting of hairs as to whether there were supposedly some mysterious person who might be indicted, some person on the stock books or on the ledgers, we want to get that matter behind us.

"Mr. ROCHE. Well you don't mean to say that Mr. Hanify is in a position to say that any indictments were pending against any people other than as against any officials of the company, do you? He certainly has not given you that information.

"Mr. STANLEY MOORE. Well, Mr. Roche, we know what you have said; we know what you have said in that interview of yours in the 'Examiner'. And we know what Mr. Sullivan said down in Mr. Olney's office, that no further indictments were contemplated. We also know that Mr. Tidwell said, that

this was not a matter of further indictment. Now, to remove any possibility of doubt about it, and in order that this court may act without any doubt upon the matter at all, and in so far as this can be determined as a question of law, we would like to call the remaining factor and prove by the spokesman of the grand jury that there was no further idea of indictments in so far as this proceeding was concerned. As long as there is a disposition here, for the purposes of this argument, to say that the grand jury might have been looking into these books for the purpose of indicting additional persons, we want to set that at rest.

“Mr. SULLIVAN. You want to prove by him that so far as he is personally concerned he did not know of any such procedure?

“Mr. STANLEY MOORE. Precisely.

“Mr. SULLIVAN. He cannot speak for the government or for the other grand jurors, can he?

“Mr. STANLEY MOORE. No. I think in a measure he could speak for the other grand jurors, he being the foreman and the head of the grand jury. But if you will admit that Mr. Hanify, if produced upon the stand, would testify, subject to your objections, that this matter was brought before the grand jury in the way of this subpoena and these papers brought up here, at their first session without any idea so far as he was concerned, or other members of the grand jury, so far as his knowledge and information is concerned, of preferring any other indictments but simply to enable you gentlemen, or the special agents, to check over these books, then there will be no occasion for calling him.

“Mr. SULLIVAN. We won't make the last admission.

“Mr. STANLEY MOORE. Mr. Hanify, will you step forward, please.

“JOHN R. HANIFY,
called and sworn:

"MR. STANLEY MOORE. Q. Your name is John R. Hanify? A. Yes, sir.

"The COURT. What do you wish to show by this witness other than what counsel has expressed a willingness to admit?

"MR. STANLEY MOORE. Your Honor, it is a very slight difference. I do not see why there should be any difficulty among counsel in agreeing upon the facts of this case. *I propose to show, if your Honor please, that there was no investigation of any kind in so far as the foreman of the grand jury was aware of at the time that this subpoena was issued and the production of these books was called for.*

"The COURT. *Counsel has expressed a willingness to admit that.*

"MR. SULLIVAN. *We admit that.*

"MR. STANLEY MOORE. *And there was no idea, so far as the foreman of the grand jury is aware, of preferring further indictments against anyone at this time.*

"MR. SULLIVAN. *So far as he knows?*

"MR. STANLEY MOORE. *Yes.*

"MR. SULLIVAN. *We admit that. We did not apply to him.*

"The COURT. *Counsel has admitted everything the witness might testify to.*

"MR. STANLEY MOORE. Will it be admitted, further than that, that if such a matter had been taken up with the grand jury, they would have been apprised of that fact through the medium of their foreman?

"MR. SULLIVAN. *Certainly not.*

"MR. STANLEY MOORE. Then there is some disposition, or apparently there might be an argument made here as to the sufficiency of this proof. We have called for the most appropriate member of the grand jury we could think of. The matter is immaterial to us except so far as the question of time is concerned.

"The COURT. I understand that, but it seems to me they have admitted everything that this witness can with any reason be expected to know. I do not desire to shut you off from any showing you wish to make I cannot conceive of anything this witness can testify to that has not been admitted by counsel. *Counsel has admitted that so far as this witness is concerned all that you claim is true.*

"Mr. STANLEY MOORE. Mr. Sullivan, would you make this admission, simply as going to the completeness of our evidence here a showing in this behalf, the foreman of the grand jury being here available; *will you admit that as to the remaining members of the grand jury there was no statement by you that the government desired the grand jury to take up or consider an investigation having in view the presentation of further indictments as against these defendants or any other individuals connected with the Western Fuel Company?*

"Mr. SULLIVAN. *Yes, we will admit that. That is correct.*

"Mr. KNIGHT. Q. Mr. Hanify, at all times mentioned in these subpoenas you were the foreman of the grand jury and in attendance and presided over its deliberations?

"Mr. SULLIVAN. It seems to me our admissions are very broad and complete. I do not think it is necessary to go into the secrets of the grand jury. I don't think this witness has a right to testify.

"The COURT. Yes, it has been assumed that he was the foreman of the grand jury.

"Mr. KNIGHT. And that he was in attendance?

"Mr. SULLIVAN. Yes, that he was in attendance.

"The COURT. You may now proceed with your arguments." (Record, pp. 97-107.)

Is it not apparent to the court that the sole object of demanding that the Western Fuel Company produce its books and papers before the grand jury was to enable special counsel for the government to make therefrom, if it could, a case against the defendants who were about to go to trial?

It is contended that the fact that Mr. Norcross had been previously called before the grand jury and had been examined by counsel for the government proved that a legal investigation was pending before the grand jury at that time. It is apparent from the record, however, that this previous examination of Mr. Norcross was in line with the later attempt, as expressed in the subpoena *duces tecum* of the 14th of August, to extract information which would be of service to the government in the trial of the case, and not for the purpose of finding or considering indictments against anyone. The government was about to go to trial upon one of the indictments that had already been found, and it then for the first time became suspiciously active before the grand jury.

In its presentment (record, p. 26) the foreman and the special assistants to the attorney general state that Mr. Norcross was sworn "to testify as a witness in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated and committed by said Western Fuel Company against the United States". All parties to the presentment denied that there was any charge pending or contemplated against the Western Fuel

Company or anyone connected with it; and whatever proceeding was being cogitated in the back of the head of one of the special assistants to the attorney general is hardly tangible enough for this court to take notice of, especially where constitutional rights are in jeopardy.

If the court will compare these statements and admissions with the statement contained in the presentment to the grand jury (record, p. 26) where the foreman is made to say that the investigation concerned certain frauds alleged to have been perpetrated by the Western Fuel Company and will compare them also with the judgment of the court wherein it is said that appellant was sworn to testify "as a witness in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated against the United States" (record, p. 20) it will become apparent that the only investigation referred to was the fishing expedition so universally condemned by judicial authorities which have had occasion to consider the subject. Otherwise, despite the statement in the judgment and the statement in the presentment there was no investigation of any kind then pending; and the evidence wholly fails to support the finding in the judgment in that respect, if the statement be deemed to be a finding of fact.

We admit that the presentment of an indictment against a defendant does not preclude the grand jury which found it, or a subsequent grand jury, from finding new indictments against the same party; but their in-

vestigation of the matter subsequent to the finding of an indictment must be with reference to the finding, or at least consideration, of a new indictment, and not merely to assist the government in the preparation for trial under an indictment already found.

The necessity for the existence of some kind of an investigation or proceeding before the grand jury in order to entitle the latter body to call for the production of documentary evidence before it has been the subject of judicial consideration.

In the cases of

In re Shaw, and

In re McLaughlin, 172 Fed. 520,

the Circuit Court for the Southern District of New York said:

“The form [of subpoena] used in this district indicates at least a general intention that a witness shall be informed of the matter about which he will be called upon to testify. I think it is proper that he should be. The fifth amendment to the Constitution provides that no one ‘shall be compelled in any criminal case to be a witness against himself.’ The Supreme Court has construed this provision largely holding that it is not confined to a criminal case against the witness himself, but extends to any criminal investigation. *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

“It is quite clear that the ordinary citizen called upon to testify in the strange environment of the grand jury room under the interrogation of the United States attorney will be quite unable to assert his rights, even if he knows what they are. He ought to have an opportunity to consult counsel and be advised of the extent of his right to refuse

to testify, and of the way in which to protect himself against giving testimony that might incriminate him.

“The United States attorney contends that in this country the grand jury has an inquisitorial power to investigate of its own motion, and that in some instances the utmost secrecy may be necessary to the success of its inquiry, and that the protection of witnesses may safely rest on the presumption that neither the grand jury nor the United States attorney will do anything unfair or oppressive.

“It would also contribute greatly to the success and celerity of some investigations if the authorities had an unlimited right to search and seize persons, houses, and papers; but the right of the citizen against such proceedings is not left to depend upon any such presumption. He is guaranteed against unreasonable searches and seizures by the fourth amendment to the Constitution. So it would unquestionably speed the detection and conviction of crime to compel suspected persons to testify; but no principle of our law is better settled than that this cannot be done.

“The subpoena being the court’s writ, it is the duty of the court, consistently with existing statutes, to regulate the use of it. It is not a question of the nature of the particular subject now under consideration by the grand jury nor of the fairness of the present United States attorney and his assistants and of the present grand jury; but the question is to determine the practice to be followed in this district in all cases by all United States attorneys and grand juries, a matter concededly of the utmost moment.

“It is pointed out that the grand jury may often be unable to name any person as connected with the subject that it is investigating of its own inquisitorial power, and, if it cannot subpoena witnesses without naming some person, the inquiry must be altogether abandoned. I think the answer

to this is that it can in such a case state in the subpoena the subject of its inquiry and so fix some definition of and limit to the examination to which the witness may be subjected. This was done in the subpoena issued out of this court in the case of the United States v. Kimball, 117 Fed. 156. It must be admitted that there is a strange absence of authority upon the subject; but Justice Brown, in *Hale v. Henkel*, 201 U. S. 43, 65, 26 Sup. Ct. 370, 375, 50 L. Ed. 652, said:

“ ‘We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed, that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify, without indicating the nature of the charge against them.’

“This language indicates that the Supreme Court thinks that witnesses should be informed in the subpoena of the names of the parties with respect to whom they will be called to testify [italics ours], although it holds it not necessary to disclose the charge brought against those persons. It must be remembered that Justice Brown was discussing the demand of a witness who has been subpoenaed to testify in a case against named persons, to know the specific charge made. It is quite in line with his view that, if the witness cannot be apprised of the name of the person so charged, he should be informed of the subject about which he will be called upon to testify.

“It is alleged that these general or John Doe subpoenas have been issued in this district for

many years. If so, they seem never to have been challenged. As Justice Bradley pointed out in *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, a long practice of issuing general warrants to apprehend persons suspected of the authorship of seditious libels and bring them and their papers before the Secretary of State for examination was relied on in *Entick v. Carrington*, 17 Howell's St. Tr. 1029. Lord Camden said:

“ ‘As no objection was taken to them upon the returns (to writs of habeas corpus) and the matter passed *sub silentio*, the precedents were of no weight.’ ”

“A subpoena *duces tecum* was also served upon Shaw as secretary and treasurer of the Press Publishing Company, World Building. It was held in *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, that a subpoena *duces tecum* might amount to an unreasonable search or seizure within the fourth amendment to the Constitution. The United States attorney consents that its terms in this case may be narrowed to an extent which seems to make it reasonable. Still the fact remains that the witness has been subpoenaed to testify generally, and that he is entitled to know either what person or persons are charged by the United States, or the subject of the investigation. I do not think that the incidental reference to articles relating to the Panama Canal in the paragraph of the subpoena called for receipts is sufficient.

“The motion to quash and set aside the subpoenas is therefore granted.”

In the case of

In re Morse, 87 N. Y. Supp. 721,

Judge Goff charged the grand jury that, in order to exercise its inquisitorial power:

“It must be made to appear by complaint or information or knowledge acquired that there is

reason to believe that a crime has been committed. They have not the power to institute or prosecute an inquiry on chance or speculation that some crime may be discovered. Such an inquisition, based upon mere suspicion, would be odious and oppressive, and would not be tolerated by our laws. There must be reason to believe that a crime of a specific character has been committed by a particular person, whose name may be either known or unknown to the grand jury. * * *

They have not the power to summon a witness and examine him upon matters that are wholly unconnected with or unrelated to the subject of inquiry. The process of the grand jury can be used only for the purpose of aiding a lawful inquiry, and it must not be used for the purpose of oppression or harassment. * * * *The grand jury, being an adjunct of the court, is considered a part thereof.* * * * [italics ours]. It should be made to appear from the whole examination [of the witness] and surrounding circumstances that the question was relevant and material to the subject of the inquiry; otherwise the court, in whose immediate presence and hearing the examination did not take place, would be unable to determine whether the witness had properly or improperly claimed his privilege. * * *

“When a grand jury finds a bill of indictment, and it is presented to the court, they have no further jurisdiction of its subject-matter, so far as the person or persons therein accused of crime are concerned, except by way of a superseding indictment for the purpose of supplying some omission, or of remedying some defect in the previous indictment. They cannot institute a new and independent inquiry for the purpose of eliciting additional testimony to supplement or strengthen the testimony on which the indictment was found, or to aid the prosecutor in the trial of the case.”

With reference to a certain question put to the witness the court said:

“It is manifest that the purpose of this question was to obtain or procure from the witness information which would aid in the trial and conviction of Dodge. That is a laudable purpose, in which every good citizen should unite, for the district attorney to zealously adopt every fair and legal method to discover and present evidence sufficient to convict a man of the heinous crime against the administration of justice which Dodge is charged with having committed. But the methods used must be fair and legal. They must not be coercive or inquisitorial, and a tribunal established or a procedure designed by law for one purpose cannot be perverted to another purpose, even though the latter be meritorious. It is better that Dodge, if guilty, should go unpunished, than that the powers of the grand jury should be invoked for an unlawful purpose. If the witness Morse has knowledge of evidentiary matters connected with that charge of perjury, it rests with his own ethical or moral perceptions of what is right whether he will voluntarily disclose them to the district attorney; but he cannot be taken before the grand jury, under the guise of a witness, and compelled to furnish information which may aid the district attorney in the prosecution of an indictment already found.

“Except as I have pointed out, this grand jury had no jurisdiction of any matter connected with that indictment; and it follows that they had no power to issue process and compel the attendance of the witness Morse for the purpose indicated by this question, and whether he properly or improperly claimed his privilege becomes of no consequence.

“From the principles which I have stated, and that are applicable to your inquiry of the court, and from the conclusions which I have drawn on

reading the examination in the light of those principles, I advise you that you cannot lawfully continue the examination of the witness Morse under existing conditions, and he must be discharged from further attendance under the present subpoena.

“Should the district attorney advise the grand jury to institute an inquiry into any crime committed or triable in this county as the law directs, and Charles W. Morse is required to appear before them as a witness, there is no legal obstacle to a subpoena being issued, compelling his attendance.

“Ordered accordingly.”

In the case of

Hale v. Henkel, 201 U. S. 43; 50 L. Ed. 652, which was an appeal from a final order of the Circuit Court, dismissing a writ of habeas corpus, involving a proceeding which originated in a subpoena *duces tecum*, it appears that the subpoena commanded Hale, who was secretary of MacAndrews & Forbes Company, to appear before the grand jury at a time and place designated to

“testify and give evidence in a certain action now pending * * * in the Circuit Court of the United States for the Southern District of New York, between the United States of America and the American Tobacco Co. and MacAndrews & Forbes Co., on the part of the United States, and that you bring with you and produce at the time and place aforesaid” certain documents.

The petitioner appeared before the grand jury and before being sworn asked to be advised of the nature of the investigation in which he had been summoned.

He was advised by the assistant district attorney, in reply to his specific inquiry, that he was called upon to testify in a proceeding brought under the Sherman Act to protect trade and commerce against unlawful restraint and monopolies. The witness was advised that he would obtain immunity from punishment arising on account of any matter or thing concerning which he might testify or produce documentary evidence. He declined to produce the papers and documents called for in the subpoena for the reason, among others, that he had been advised by counsel that he was under no legal obligation to produce anything called for by the subpoena.

The court will notice that the subpoena in that case did refer to a specific investigation, and from the statement of the assistant district attorney there was apparently such an investigation actually under way before the grand jury, in which respect the case totally differs from the case at bar.

In his opinion Mr. Justice Brown discusses the objection made by the witness in refusing to answer questions propounded to him, that there was no specific "charge" pending before the grand jury against any particular person, by seeking to define the word "charge" as used in this connection, and held that the grand jury could proceed to investigate a matter without the formality of a written charge. He quotes with approval a portion of a lecture delivered by Mr. Justice Wilson before the students of the University of Pennsylvania, found in Wilson's Works, Vol. 2, p. 213, as follows:

“It has been alleged that grand juries are confined, in their inquiries, to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. *They are not appointed for the prosecutor or for the court; they are appointed for the government and for the people* [italics ours]; and of both the government and people it is surely the concernment that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment which the law denounces; and that, on the other hand, innocence, however strongly assailed by accusations drawn up in regular form, and by accusers, marshaled in legal array, should, on full investigation, be secure in that protection which the law engages that she shall enjoy inviolate.

“The oath of a grand juryman—and his oath is the commission under which he acts—assigns no limits, except those marked by diligence itself, to the course of his inquiries: Why, then, should it be circumscribed by more contracted boundaries? Shall diligent inquiry be enjoined? And shall the means and opportunities of inquiry be prohibited or restrained?”

Justice Brown also quotes with approval the language used by Judge Addison, president of the court of common pleas, where he charged the grand jury as follows:

“If the grand jury, of their own knowledge, of the knowledge of any of them, or from the examination of witnesses, know of any offense committed in the county, for which no indictment is preferred to them, it is their duty either to inform

the officer who prosecutes for the state, of the nature of the offense, and desire that an indictment for it be laid before them, or, if they do not, or, if no such indictment be given them, it is their duty to give such information of it to the court; stating, without any particular form, the facts and circumstances which constitute the offense. This is called a presentment."

The court refers to the case of *In re Lester*, 77 Ga. 143, as holding that the powers of the grand jury are inquisitorial to a certain extent, yet that they must be exercised within certain well defined limits, and said:

"The grand jury can find no bill nor make any presentment except upon the testimony of witnesses sworn in a particular case, where the party is charged with a specified offense.

"This case is readily distinguishable from the one under consideration, in the fact that the subpoena in this case did specify the action as one between the United States and the American Tobacco Company and the MacAndrews-Forbes Company."

The learned justice thus summarizes his conclusions upon this point:

"We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, *and that, in summoning witnesses, it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the na-*

ture of the charge against them [italics ours]. So valuable is this inquisitorial power of the grand jury that, in states where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to courts of impaneling grand juries for the investigation of riots, frauds, and nuisances, and other cases where it is impracticable to ascertain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted. As criminal prosecutions are instituted by the state through an officer selected for that purpose, he is vested with a certain discretion with respect to the cases he will call to their attention, the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings. Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them. While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own observations or upon the evidence of witnesses, given before them."

It is apparent, as the Circuit Court for the Southern District of New York said in the *Shaw* and *McLaughlin* cases, *supra*, that persons called as witnesses before a grand jury are entitled to know either the names of parties against whom they are called to testify, or the nature of the charge that is made against known or unknown parties. They are entitled to know that there is a charge or proceeding of some kind pending against

some one, whether initiated by the district attorney or by the grand jury of its own motion. But it conclusively appears in the case before the court that not only was there no charge or proceeding of any kind pending before the grand jury, but that the witness was told by the officer whose duty it was to collect evidence against the parties who were about to be tried, that there was no further proceeding contemplated before the grand jury. And it also affirmatively appears that the government merely wanted the papers and records in question to make a case against the officers and employes of the Western Fuel Company when the case was reached for trial.

Mr. Justice Field charged the grand jury, *Fed. Cas. No. 18,255* (2 Sawy. 667) that:

“There is a wide difference between the powers and duties of grand juries of the state courts of California and of grand juries of the national courts,”

specifying that the former had general inquisitorial powers, while the scope of the latter field was more limited.

“The first designation of subjects of inquiry are those which shall be given you in charge; this means those matters which shall be called to your attention by the court, or submitted to your consideration by the district attorney. The second designation of subjects of inquiry are those which shall ‘otherwise come to your knowledge touching the present service’; this means those matters within the sphere of and relating to your duties which shall come to your knowledge, other than those to which your attention has been called by the court or submitted to your consideration by the district attorney. * * *

“We, therefore, instruct you that your investigations are to be limited: First, to such matters as may be called to your attention by the court; or, second, may be submitted to your consideration by the district attorney; or, third, may come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or, fourth, may come to your knowledge from the disclosures of your associates.”

Justice Field did not include, among these duties of the grand jury, the preparation of a case for the district attorney by summoning before it witnesses, books and papers that the district attorney concluded might prove serviceable to him.

In the case of

Newgold v. American Electrical Novelty and M'fg. Co., 108 Fed. 341,

it was held by the District Court for the Southern District of New York that in a criminal action a defendant cannot be compelled to produce his books and papers before trial for examination by the plaintiff for the purpose of showing the number of penalties alleged to have been incurred, as section 724 of the Revised Statutes which authorizes a court in an action at law to order the production of books and writings which contain evidence pertinent to the issue, and where there might have been a discovery thereof by the ordinary rules of proceeding in chancery, as by a bill of discovery, does not apply to a case which involves a penalty or a forfeiture.

Again, where the documentary evidence sought for will tend to subject it to a penalty, plaintiff cannot obtain an order for its production.

In the case of

U. S. v. National Lead Co., 75 Fed. 94,

the district attorney did not have the hardihood to use the grand jury for the purpose of obtaining in advance of trial the books of the National Lead Company in order to get information as to the materials used in the shipments for which drawbacks were obtained—fraudulently it was claimed—from the government, but resorted to a notice to produce under section 724 of the Revised Statutes.

The court held that under that section

“the exercise of the power vested in federal courts to require production of such books or writings is limited to causing such production to be made at the trial,”

citing authorities to show

“that the party calling for books has no right to examine them before trial, to see whether there be not something in them pertinent to the issue.”

But the court found a more serious objection to the granting of the motion in the fact that the case was virtually of such a character that the evidence sought to be obtained by the books might, though not necessarily would, tend to subject the officers and agents of the defendant corporation to an accusation of crime.

We do not resist the production of the books and papers in the present case in reliance on that portion of

the fifth amendment to the Constitution which protects any officer or agent of the Western Fuel Company from being a witness against himself in a criminal case; but the case just cited shows that in a criminal proceeding courts will not compel a defendant to produce evidence which they would compel him to produce in the trial of a cause of a civil nature.

THE SUBPOENA VIOLATES THE FOURTH AMENDMENT.

Our fourth objection to the subpoena *duces tecum* is that by reason of its sweeping character it constitutes an unreasonable search and seizure of the Western Fuel Company's books and papers contrary to the fourth amendment to the Constitution of the United States.

While corporations have been deprived of, or rather held not to be entitled to the protection against self-crimination afforded individuals by the fifth amendment to the Constitution, it has been determined that they are entitled to the privileges contained in the fourth amendment against unreasonable searches and seizures.

Hale v. Henkel, supra.

Let me again call attention to the language of the subpoena:

"All books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company situate on Folsom Street Dock

in the City and County of San Francisco on the 1st day of January, 1904, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker, and also showing the amount and weight of coal on the 1st day of January, 1904, in the coal yard of said Western Fuel Company connected with said bunker by a tramway and situate on East street, in said City and County of San Francisco; and also showing the amount and weight of all coal in all other bunkers and places containing, or which contained coal of the Western Fuel Company on the 1st day of January, 1904, in the State of California.

“Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker and delivered from said yard, between the 1st day of January, 1904, and the date hereof.

“Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the amount and weight of coal on this date in said bunker of said Western Fuel Company, including said off-shore and said in-shore bunker, and in said yard.

“Also all books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company, situate on said Folsom Street Dock, on the 1st day of May, 1906, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker; and also showing the amount and weight of coal on the 1st day of May, 1906, in said coal-yard of said Western Fuel Company, and also showing the amount and weight of all coal in all other bunkers and places in the State of California containing or which contained coal of the Western Fuel Company on the 1st day of May, 1906.

“Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker, and delivered from said yard, between the 1st day of May, 1906, and the date hereof; also showing all coal delivered from any and all other bunkers and places containing, or which contained coal of the Western Fuel Company between the 1st day of January, 1904, and the date hereof, and also between the 1st day of May, 1906, and the date hereof.

“Also all books, papers, records and documents of said Western Fuel Company, a corporation, in your possession or under your control, showing the weight of each load of coal taken from said in-shore and said off-shore bunker and out of said yard, and out of all other bunkers and places containing, or which contained coal of said Western Fuel Company, between the 1st day of January, 1904, and the date hereof; also showing the name of the person or persons to whom each of said loads of coal was sold or delivered, the date or dates upon which each of said loads of coal was so sold or delivered, and the amount charged to the person or persons to whom each of said loads of coal was so sold or delivered, and the amount paid for each of said loads of coal so sold or delivered.

“Also all weekly, monthly and yearly financial and other reports made to the directors of the Western Fuel Company, showing the financial condition of the affairs of said company; also the minute-books of said company containing the minutes of the meetings of the directors and the minutes of the meetings of the stockholders of said company between the 1st day of January, 1904, and date hereof.

“Also all stock ledgers, stock journals and stock certificate books showing the names of the vari-

ous holders of shares of the capital stock of said Western Fuel Company on the 1st day of January, 1904, and at all times between January 1, 1904, and the date hereof.

“Also all ledgers, cash-books and papers showing the expenses incurred and paid out by said Western Fuel Company between the 1st day of January, 1904, and the date hereof, and to whom said payments were made”

It was also shown, without contradiction, by the affidavit of appellant that

“The trial of these indictments is set for Tuesday, August 26, 1913, in this court. For several weeks past the attorneys have been requiring me to make up tables, compilations, summaries and statements from these books and certain of these tables, statements and compilations are still uncompleted and these books are being made use of every day in the preparation of the defense of its officers and directors. I am informed by the attorneys, and I believe, and I therefore state, that they will continue to require the use of these books up to the time of trial which is only eight days from today.

“The purported subpoena served upon me on August 14, 1913, calls for the production of all the books the company has. To produce them would involve a suspension of the company's business. They are so numerous that it would take two express wagons to carry them out to the grand jury room. It consists of a wholesale demand for all the company's books and papers.”

The court will again bear in mind in this connection the juxtaposition of the two dates; that of the date of the subpoena, August 14, and the date of trial, August 26, in connection with this extraordinary raid on the company's records and documents.

We contend that this subpoena *duces tecum* comes within the inhibition laid down in the constitutional amendment and in the various federal decisions, not only because its issuance was unauthorized, as we have shown, but because of its sweeping demand.

In the case of *Boyd v. U. S.* to which I shall shortly again refer, it was held that constitutional provisions for the security of persons and property should be liberally construed in favor of those who are thus protected. Hence it follows that any doubt arising as to the scope of such a provision should be resolved in favor of those who were presumably intended to be thereby protected.

In the case of

Hale v. Henkel, supra,

the Supreme Court had before it a subpoena no more searching in its character, or sweeping in the scope of its demand, than that now before the court. It was contended by the witness that the subpoena was an infringement upon the fourth amendment of the Constitution as being an unreasonable search and seizure. The Supreme Court sustained this contention, Mr. Justice Brown saying:

“Applying the test of reasonableness to the present case, we think the subpoena *duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies,

as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union.

“If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case [italics ours], and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426; Shaftsbury v. Arrowsmith, 4 Ves. Jr. 66; Lee v. Angas, L. R. 2 Eq. 59.”

We may here remark that a consequence similar to that adverted to by the court would follow a compliance by Mr. Norcross with the government's demand. It is shown uncontradictedly by the evidence that the absence of these books would not only tend very seri-

ously to embarrass the company in the daily transaction of its business, but also would seriously jeopardize the interests of the parties who were about to go to trial by depriving them of the means of perfecting their defense.

In the case of

In re American Sugar Refining Co., 178 Fed.
109,

Judge Lacombe, in New York, denied a motion made by the United States Attorney to punish the American Sugar Refining Co. for contempt in failing to obey a subpoena *duces tecum* requiring it to produce certain books and papers before the grand jury.

“for the reason that the subpoena is obnoxious to the criticism which was sustained by the Supreme Court in *Hale v. Henkel*”, *supra*,—as being “‘far too sweeping in its terms to be regarded as reasonable’ ”;

and the subpoena under consideration in that case was not more obnoxious than the one now before the court.

In the case of

Lee v. Angas, Law. Rep. 2 Eq. Cases, 59,

frequently cited in this connection it was held that a subpoena *duces tecum* requiring a solicitor, not a party to the suit, to produce all papers, etc., relating to all dealings and transactions between his firm and the plaintiffs or defendants (as the case may be), for a period of thirty years, without specifying any particular documents required, was too vague, and the witness was entitled to refuse their production.

In the case of

Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746,

Mr. Justice Bradley said:

“But, in regard to the fourth amendment, it is contended that, whatever might have been alleged against the constitutionality of the Acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man’s house and searching amongst his papers, are wanting; and to this extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former Acts; but it accomplishes the substantial object of those Acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man’s private papers to establish a criminal charge against him or to forfeit his property is within the scope of the fourth amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and affects the sole object and purpose of search and seizure.

“The principal question, however, remains to be considered. Is a search and seizure or, what is equivalent thereto, a compulsory production of a man’s private papers, to be used in evidence

against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an ‘*unreasonable* search and seizure’ within the meaning of the fourth amendment of the Constitution? Or is it a legitimate proceeding?”

The learned justice answered this latter question in the negative, and after quoting at length with approval from Lord Camden’s memorable discussion of the subject of searches and seizures in the case of *Entick v. Carrington*, 17 Howell’s St. Tr. 1029, he said, in speaking of the intimate relation between the fourth and fifth amendments:

“We are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit * * * is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the fourth amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and affects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy en-

croachments thereon. Their motto should be *obsta principiis.*”

In the case of

Ex parte Brown (Mo.), 37 Am. St. Rep. 426, the court had under consideration the twenty-third section of the bill of rights of Missouri, which is virtually the same as our fourth amendment, and said:

“The section declares that the people ought to be secure, in their papers, from unreasonable searches, and whether a subpoena *duces tecum* for papers, or search warrant for chattels, be issued, the spirit of that section demands that while in the latter case there must be probable cause, supported by oath or affirmation, with a description in the warrant of the place to be searched, or the thing to be searched for, in the other, it shall at least give a reasonably accurate description of the paper wanted, either by its date, title, substance of the subject it relates to, and that it shall be shown to the court or authority issuing the process that there is a cause pending in a court and that the paper is material as evidence in the cause. To permit an indiscriminate search among all the papers in one’s possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness summoned before them, without reference to any particular offense which is a subject of inquiry, what he knows touching the violation of any section of the Criminal Code. Give such a body, in addition, the power to search any man’s papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber

was to Englishmen, or the Spanish inquisition to the civilized world.

“Here, communications, at different times within a period of fifteen months, sent or received by the parties named, are called for. The date, title, substance, or subject matter of none of them is given, and it is utterly impossible that it could have been made to appear, without more, that any of the messages were material as evidence before the grand jury. Moreover, it not only called for all messages between the parties named, but for all which may have been sent or received by either of the parties, to or from, any person on the face of the earth. A compliance with the order might have resulted in the production of confidential communications between husband and wife, client and attorney, confessor and penitent, parent and child. Matters which it deeply concerned the parties to keep secret from the world, and of no importance or value as evidence in any cause, might thus be disclosed to the annoyance and shame of the only persons interested. Incidents in the lives of members of families which the happiness and welfare of the household require to be kept secret, might be exposed, and offenses not recognizable by the law, long since committed and condoned, brought to light and hawked through the country by scandal mongers, to the disturbance of the peace of society and the destruction of the happiness of whole households. It is no answer to this that the obligation of secrecy imposed by law on grand juries would prevent such exposure. It is enough to disturb and harass a man, that twelve of his neighbors, though sworn to secrecy, have acquired knowledge diminishing their respect for him, which they had no right to obtain, and they may be the very twelve men with whom, above all others, he most desired to be in good repute. Such an inquisition, if tolerated, would destroy the usefulness of this most important and valuable mode of communication by subjecting to exposure the private

affairs of persons intrusting telegraph companies with messages for transmission, to the prying curiosity of idle gossips, or the malice of malignant mischief-makers.

“The power of a court of equity to compel a discovery by any party defendant to the suit, of any document in his possession, or fact resting in his knowledge, material to the issue on trial, bears an analogy to the subpoena *duces tecum*, and that power cannot be exercised to compel any discovery not material to the cause; and on that subject, Lord Loughborough, in *Shaftsbury v. Arrowsmith*, 4 Ves. 66, said: ‘Permitting a general, sweeping survey into all the deeds of a family, must be attended with very great danger and mischief. It may set up a title, not for the benefit of the plaintiff, but to the injury of the devisees, indulging a speculation to the prejudice of parties whose interest this court has no right to invade.’ Mr. Fonblanque in his work on Equity, says: ‘A plaintiff by this bill may without the least foundation impute to the defendant the foulest frauds, or seek a discovery of transactions in which he has no real concern; and when the defendant has put in his answer, denying the frauds or disclosing transactions (the disclosure of which may materially prejudice his interests), the plaintiff may dismiss his bill with cost, satisfied with the mischief he may have occasioned by the publicity of his charge, or the advantage he may have obtained by an extorted disclosure.’ In reference to this abuse of the proceeding he says: ‘The court alone can counteract it; and in vindication of its process, must feel the strongest inclination to interpose its authority.’ 2 Fonb. Eq. B. 6, ch. 8, sec. 1, note a. These observations are equally applicable to the subpoena *duces tecum*. The abuse of the power to compel a discovery is sedulously guarded against in equity jurisprudence, and yet ten-fold greater injury could be inflicted by means of a subpoena *duces tecum*, if it can compel a sweeping,

indiscriminate production and inspection of the papers of any party to the suit, or witness in the trial. If our bill or rights had not guarded the citizen against such an abuse of a judicial process, we would be inclined to apply to this process the wholesome restrictions which equity jurisprudence has placed upon the power of a court of equity to compel a discovery."

How truthfully may we apply these observations to the present case! It is a matter of common knowledge spread broadcast by the public prints, that the defendants in the case about to be tried have been indicted upon evidence obtained entirely by entries in their own books which were voluntarily given to the officers of the government when requested, and thereafter impounded by them for weeks at a time, with no opportunity afforded these defendants to explain how or under what circumstances these entries were made. Their very prominence in the community made them a shining mark for the accusation of fraud, which was brought against them; and with the sensationalism which was sought to be given to the case from certain official quarters, is it to be wondered at that after garbled reports had been industriously circulated broadcast, and an attempt made to create an atmosphere here distinctly hostile to the Western Fuel Company, the defendants should resent the improper use which had thus been made of the books and papers which they had voluntarily furnished to the government and insist on standing upon their legal rights by declining to give the government agents the opportunity to again pry into their business

affairs with the hope that they might find there something that could be so twisted or distorted as to be made available at least by way of innuendo, if not evidence? And while a change for the better has apparently taken place upon the advent of special counsel for the government, the experience of the defendants has been such as to teach them that their only course is to rely upon the constitutional rights which they are now invoking.

See also the case of

Ex parte Chapman, 153 F. 371,

which your Honor, Judge Gilbert decided and which is referred to in the dissenting opinion of Mr. Justice McKenna in the Wilson case, to which attention will be hereafter called.

Furthermore, when all of the company's books, papers and records are demanded by the government twelve days before all of the officers and directors and some of the principal employes of that corporation are about to go to trial under a conspiracy charge involving the entire business transacted by that company from the time of its incorporation, a reasonable course for the government to have followed, if it was in good faith seeking to implicate others in the transactions complained of, or intending to find new indictments against those already under indictment, would have been to postpone the effort before the grand jury until the trial had been concluded, and not wrest from these defendants the means whereby they proposed to assert

their innocence and explain the business transactions alleged to have been criminal.

We have heretofore stated, and we now repeat, that coming as it did upon the eve of trial, the demand contained in the subpoena under question was unreasonable by virtue of the circumstances under which it was made, regardless of the other objections which we have stated. It was as unreasonable, and we submit as violative of the rights of appellant and plaintiffs in error under the fourth amendment to the Constitution, as it would have been just before trial to have deprived any defendant of the documentary evidence upon which he relied, by forcibly raiding his premises, seizing and impounding it. If practice such as that exemplified in the case now before the court is to be tolerated as reasonable, then no person charged with the commission of a crime can feel that he will be hereafter safe in the preparation of his defense, for he may find the strong arm of the government, just before trial, stretched out to grasp and retain the means he had relied upon for his defense. No more shocking or inhuman inquisition, short of bodily torture, has ever been attempted in a civilized country to deprive a defendant of the legal weapons with which to meet his accuser.

THERE WAS NO PROPER FOUNDATION FOR THE CONTEMPT PROCEEDINGS RELATIVE TO THE CHARACTER OF THE EVIDENCE SOUGHT TO BE PRODUCED.

Our last objection to the action of the learned court below adjudging appellant guilty of contempt is that

it nowhere appears that he refused to give material or relevant evidence, or to produce documents which were material or relevant to any pending matter. This objection has been foreshadowed by a reading of several of the decisions to which the court's attention has just been called. Before a party can be adjudged guilty of contempt for failing to testify or produce books or papers, it must be shown that the witness was called upon to testify to facts, or to produce documents, which were material or relevant to the issue of any cause, and the record in this case is silent on the subject. It nowhere appears, either by presentment of the grand jury, or otherwise, that the voluminous papers called for by the subpoena *duces tecum* were, or that any of them was, relevant or material to any pending matter; and, as we have shown, there was no matter pending in which any books or papers could have been relevant or material.

It was held in

Ex parte Peck, 3 Blatchf. 113, Fed. Cas. No. 10, 885,

which, with the next three cases, is referred to in the case of *United States v. Terminal R. R. Ass'n*, to which attention has been called, that, on a motion for an attachment for an alleged contempt where the witness refused to obey a subpoena *duces tecum*, before he could be adjudged guilty of contempt:

“It must also be shown that the witness was called to testify to facts material and relevant to the issue in the cause. The court will interfere in

this summary way only to aid the plain demands of justice, and will not attach a witness for neglecting to testify without evidence that his testimony is pertinent to the case and such as the party is entitled by law to demand.”

It was said

In re Judson, 3 Blatchf. 116, Fed. Cas. No. 7,
563,

that

“Before the court will adjudge a witness to be in contempt or commit him therefor, it will require more than proof that he declines to respond to a question. It will inquire whether the question is relevant and material to the case or hearing, and also whether the witness is legally exempt from answering it.”

In the case of

Bischoffsheim v. Brown, 29 Fed. 341,

it was held that

“The books, papers and documents asked to be produced not being shown to be material or relevant, the motion for a subpoena *duces tecum* must be denied.”

In

Crocker-Wheeler Co. v. Bullock, 134 Fed. 241,

the court held that the facts sought to be proven by the books which one of the parties desired to have produced by a subpoena *duces tecum*, were not relevant or material to the issues in the cause, and that for this reason the witness had a legal right to withhold them.

The government does not assert, or attempt to show either by the grand jury or by evidence, and it doesn't

know, that any of the papers called for are material or relevant to any proceeding which might be brought before the grand jury. It could not have this information because its expedition is, as we have said, purely for fishing purposes, hoping that something might be gleaned from these documents that would prove of some service to the government in the trial of the case of conspiracy.

In the case of

Morrison et al v. Sturges et al., 26 Howard's
Prac. Rep. (N. Y.) 177,

it was held that a court will not compel a discovery of books and papers unless satisfied that they contain evidence relating to the merits of the action. It is not enough that the party believes or is advised that the documentary evidence desired contains material evidence. Facts must be shown to support such belief.

Our State Supreme Court has held in

Ex parte Rowe on Habeas Corpus, 7 Cal., 181, that where a person had been committed for contempt of court in refusing to answer certain questions propounded to him by the grand jury, the commitment should state that the grand jury were inquiring into a certain question, stating what that question was; that the prisoner was sworn as a witness and certain questions asked him, which questions should be stated, and that the facts were thereupon presented to the court by the grand jury, etc.

In the case of _____,

Ex parte Clarke, 126 Cal. 235,

the court stated that the question involved in the case was

“of great importance to all citizens, for it involves the constitutional right of the people to ‘be secure in their persons, houses, papers, and effects against unreasonable seizures and searche[r]s’. (Const, art. I, sec. 19.) To compel a person to deliver his books and papers to another who does not claim any ownership in them is to violate the sanctity of most important private rights, and is not to be tolerated except when warranted by some law clearly not inconsistent with the constitutional provision. As was said by Lord Camden in the celebrated case of *Entick v. Carrington*, 19 How. St. Tr. 1066, which was an action to recover damages for breaking into a private house and seizing private papers: ‘Papers are the owner’s goods and chattels; they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot, by the laws of England, be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of these goods will be an aggravation of the trespass.’ The privacy of private books and papers is not only of inestimable value to the owner on account of various personal and sentimental reasons, but is of the greatest value also from mere business considerations; the exposure of a man’s methods of business would frequently be highly injurious to him, and, although really solvent, might produce such embarrassments as would ruin him. His right, therefore, to the sole possession and knowledge of his private books and papers is not to be violated, except where the power to do so clearly appears. In many of the states there are statutes on the subject of the production of books and papers in

court during a trial and providing in detail under what circumstances orders for their production may be made. In this state about all there is on the subject is to be found in sections 1000 and 1985 of the Code of Civil Procedure. Section 1000 provides for an order, in certain cases, upon notice, that a party to a pending action may have an 'inspection' and copy of accounts in any book or of a document of paper 'containing evidence relating to the merits of the action or the defense therein', and prescribing a certain penalty for a refusal; and there is a provision at the end of the section that it shall not be construed 'to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness'; but the proceeding in the case at bar was not under that section, and, moreover, it is applicable only to proper cases—for no one would claim that it gives unbridled license for the examination or production of all such private papers as the caprice, or curiosity or ulterior design of a party might suggest. Section 1985 provides for what is usually called a subpoena *duces tecum*, by which a witness is required to bring with him any books, documents, et cetera, 'which he is bound by law to produce in evidence'; but the proceedings in the case at bar were not under that section, and, moreover, it does not prescribe what things he is 'bound by law to produce'. It may be assumed, however, that—although we have no express affirmative statutory provisions on the subject—when a witness is in court, no matter how brought there, and discloses the fact that he has a paper, document or book which would be evidence in favor of the party desiring it, he may, in a proper case, be rightfully ordered to produce it. But it is evident that we must look to general principles of law applicable to the subject when it is to be determined in what instances a court has the power to compel a witness to give up his books and papers and disclose his private business to the world. And the ques-

tion raised here is one of power in the court, and may be inquired into on *habeas corpus*. Indeed, there is no other way in which a party deprived of his liberty as petitioner was could recover his freedom. The same principle applies as when a witness has been imprisoned for contempt for not answering a question not legal or pertinent, and it has been held by this court that in such a case he will be discharged. In *Ex parte Brown*, 97 Cal. 83, the petitioner had been ordered to produce a package of tickets and had been sent to jail for refusing to do so, and this court discharged him on *habeas corpus*, and said that 'It is the settled law of this state that no court or judge has power to punish as a contempt the violation or disregard of an unlawful order.' In *Ex parte Zeelandlaar*, 71 Cal. 238, the petitioner had been imprisoned for contempt for not answering as a witness a question not legal or pertinent to the issue, and he was discharged on *habeas corpus*. Several concurring opinions were delivered in the case; and it was held not only that the petitioner could not be punished for refusing to answer the question, but that the commitment must show affirmatively that the question was legal and pertinent to the issue. (See, also, *Ex parte Rowe*, 7 Cal. 181.) *And a witness can no more be lawfully imprisoned for refusing to produce papers and books which he cannot legally be required to produce, than he can be for refusing to answer questions not proper to be asked* [italics ours].

"In the case at bar, we are satisfied that the order in question was unauthorized. There was no showing by affidavit or otherwise that the books in question contained any evidence material to plaintiff's case; the only evidence on the point was the testimony of petitioner when on the witness stand as plaintiff's own witness, and that showed that they did not contain such evidence. In *Morrison v. Sturges*, 26 How. Pr. 179, the court say: 'It is not enough that the party believes or

is advised that the paper contains material evidence. The facts must be shown to support such belief.' Moreover, it was in effect a general omnibus order for the production of all defendant's books, which has always been held to be unauthorized; for, while it named certain books, yet those constituted all of defendant's books, as appears from plaintiff's examination of petitioner as to what books the defendant had. Again, the order was in the nature of what Lord Chancellor Hardwicke, over a century ago, called 'a mere fishing bill', and such bills have been universally condemned. It is quite evident that these books were not required to be produced for the direct purpose of introducing them in evidence. Plaintiff would not have offered them or any part of them in evidence unless he found something in the part offered that was relevant and material in support of his side of the case; and indeed, they would not have been otherwise admissible. He merely intended to draw his dragnet of inspection through all these books under the ostensible motive of trying to catch something which his witness had testified was not there. In the meantime, all the private business of the defendant—all its dealings with persons other than plaintiff, its methods of conducting its affairs, perhaps its financial condition and other matters vitally important to its welfare—would have been exposed. There is no warrant in the law for such a forcible wholesale violation of a person's privacy upon such a showing as was made in this case. A man does not lose all his civil rights because he is brought into court as a party to a suit. As was said by Lord Hatherley: 'A court is bound to protect the defendant against undue inquisition into its affairs' (L. R. 7 Ch. App. 97, and notes); and it would be difficult to imagine a more striking instance of such 'undue inquisition' than an order compelling a defendant to produce for inspection all his books upon the mere suspicion—against positive evidence

to the contrary—that they might possibly contain some evidence favorable to the plaintiff, and without pointing to any particular part of all these books over which this suspicion was supposed to hover.

“The authorities on the subject are innumerable. Many of them arose out of discussions of the old ‘bill of discovery’, and many out of later statutory provisions; but the principles which they declare are clearly to the point that such an order as is here under review is unauthorized. Originally, an order for the production of a paper, document, or book was made only when the document was one declared on in the bill or set up as a defense; or where the party asking for it had an interest in the document itself—as where it was a contract between the parties, and there was only one copy of it which was in the hands of the opposite party; or where the instrument was, in the very nature of things, material evidence, as where it was alleged to have been forged or altered, and that it would on its face show the fact alleged; or where books belonged to both parties and would necessarily contain evidence of the issues pending—as in case of a suit between partners, or generally between principal and agent or trustee and beneficiary. (See 2 Phillips on Evidence, Cowen & Hill’s and Edwards’ notes, c. IV, 321, and notes.) Afterward, such orders were undoubtedly extended so as to include other grounds for production of papers, and were in many states, as hereinbefore noticed, regulated by statutes and rules of court; but the principles applicable generally to the forced production of papers are declared in the authorities as above stated, and we have been referred to no case warranting such an order as the one now under review. The subject, in all its bearings, both at common law and under recent statutes, is fully discussed in 2 Wait’s Practice, commencing at page 522, where a very large number of authorities touching the question are cited. Many

cases are there cited to the point that there must be a substantial showing that the document or book sought for contains material evidence in support of the cause of action, or defense, of the party asking for it; and that such a mere suspicion as appeared in the case at bar will not warrant an order for production. But the principle which is determinative of the invalidity of the order involved in the case at bar is stated on page 533, where the author says: 'The right given by statute to discover books, papers, and documents relating to the merits of a pending action does not entitle a party to enter into a mere fishing examination of all the books, papers, and documents of his adversary. An inquisitorial examination was not contemplated by the framers of the statute.' (Citing authorities.) In *Hoyt v. American Exchange Bank*, 8 How. Pr. 93, the court said: 'He has no right to have a general inquisitorial examination of all the books, papers, and documents of his adversary with a view to ascertain if, perchance, something cannot be found which will probably aid him.' There are numerous authorities to the same point."

Much reliance is placed by the learned court below, and by special counsel for the government, upon the case of

Wilson v. United States, 221 U. S. 361 (55 L. Ed 771);

but a comparison of the record and of the opinion in that case with the facts of the case at bar discloses several vital points of difference.

In the first place, the subpoena *duces tecum* in the Wilson case specified that a charge or proceeding was pending before the grand jury with respect to which the required documentary evidence was to be used, and

stated what it was; while in the case at bar, as I have said, the subpoena *duces tecum* does not state that any charge or proceeding was pending before the grand jury, and, in fact, none was. The first head note in the report of the *Wilson* case is misleading in this respect.

In the second place, the subpoena in the *Wilson* case merely called for the production of letter press copy books of the United Wireless Telegraph Company containing copies of letters and telegrams covering only a period of two months, May and June, 1909, while in the case at bar the demand is, as we have shown, of the most sweeping character, being *omnibus* in its description of, and calling for, all books, papers, records and vouchers of the Western Fuel Company covering a period of nearly ten years, embracing virtually the entire business transacted by that corporation from the first day of January, 1904, virtually when it commenced to do business, to the 14th day of August, 1913, and all the weekly, monthly, and yearly financial and other reports made to the directors of the company showing the financial condition of the affairs of that company, as well as the minute books containing the minutes of the meetings of directors, minutes of the meetings of stockholders from the first day of January, 1904, to the 14th day of August, 1913, and all the stock ledgers, stock journals and stock certificate books, with all the information therein contained between those dates, as well as all ledgers, cash books and papers showing expenses incurred and paid out by the Western Fuel Company in the course of its business between

those dates. The demand made in the Wilson case was more than reasonable; it was modest. The demand made in the present case was immodest, unreasonable, outrageous.

In the third place, and with reference to that portion of the opinion in the Wilson case in which Mr. Justice McKenna wrote a very vigorous dissenting opinion, that is on the question of the production of corporate books, it will be noticed that the subpoena *duces tecum* there called for the production by Wilson of certain letter press copy books of the corporation of which he was president and had control; and much of the opinion of the majority of the court is taken up with the discussion of the question as to whether or not Wilson could properly refuse to produce these books, which were not his own, simply because in them were contained copies of his private correspondence, whose production would tend to incriminate him, as he was under investigation. The court observed that the subpoena did not seek to reach his private correspondence, and, furthermore, that he could not make the books of the corporation his private or personal books by using them for his personal, as well as the corporate, business. The ground of the court's decision upon this phase of the case was that the books belonged to the corporation, and not to Wilson, and that neither it, nor he on behalf of the corporation, could invoke the protection of the fifth amendment against self-crimination. The opinion summarizes the conclusion reached in the following language:

“That demand [contained in the subpoena *duces tecum*], expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. * * * It could not depend upon the question whether or not another was accused. The only question was whether, as against the corporation, the books were lawfully required in the administration of justice.”

Then, again, in that case Wilson was adjudged in contempt of court and committed to the custody of the marshal

“until he shall cease to obstruct and impede the United Wireless Telegraph Company from complying with the subpoena *duces tecum* attached to the above-mentioned presentment, or otherwise purge himself from this contempt.”

He was specifically charged by the grand jury with
 “preventing the corporation from complying with the process”.

He was obstructing the administration of justice by preventing someone else from obeying the process of the court. He was not technically adjudged guilty of contempt for refusing to produce records of which he had the sole control. The directors of the United Wireless Telegraph Company had voted to comply with the subpoena and had directed Wilson to surrender the required letter press books, which the latter refused to do.

In the present case, however, the demand for the books is made upon the owner, to wit: Western Fuel Company through its secretary, the appellant herein, upon whom the subpoena was served, and he has acted throughout, not in an individual capacity, but wholly as secretary and on behalf of the Western Fuel Company. Neither that company, nor its secretary, resists the production of the books on the ground that they would tend to incriminate anyone, including themselves, which was the express ground of refusal alleged in the Wilson case, and which the court declined to sanction for the reason that a corporation cannot avail itself of the fifth amendment to the Constitution with respect to self-crimination; and Wilson could not assert this alleged privilege for the corporation. Appellant and plaintiffs in error here are third parties to the main controversy between the United States and the directors and certain employes of that company, and the rights the former assert are with respect to their own property and on behalf of themselves, and not on behalf of, or with respect to, the property of others.

We respectfully insist that, to use the language of Mr. Justice Hughes in the Wilson case, the government's demand for documentary evidence must be

“expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case”,

and that these books and records must be

“lawfully required in the administration of justice”.

So that we, as well as the learned court below and counsel for the government, rely upon the Wilson case as sustaining our contention.

The cases of

Wheeler v. United States, Adv. Sheets U. S.

Sup. Ct. of Feby. 15, 1913, p. 150;

Shaw v. Same, same reference, and

Grant v. Same, Adv. Sheets U. S. Sup. Ct. of

Feby. 15, 1913, p. 190,

do not throw additional light on the subject. In the first two cases the corporation whose books and papers were demanded had become defunct and hence no constitutional right could have been invoked on its behalf. Furthermore, it was the parties who were under investigation by the grand jury who were claiming that the protection afforded to them of the fourth and fifth amendments extended to these records, a claim which the court declined to sustain.

In the case last cited, it was held that certain books of a defunct corporation entrusted to an attorney by his client could not be withheld from the grand jury by the attorney on the ground that they would incriminate his principal.

CONCLUSION.

Does the practice of the government in the cases now before the court conform to the judicial definition of the grand jury as an adjunct of the court? Is this use of the grand jury compatible with the theory that it stands between the government and the people?

It was the writs of assistance issued to revenue officers of the Crown in the Colonies that, more than anything else, brought on the war of Independence.

James Otis, we are told in *Boyd v. U. S.*, pronounced them "the worst instruments of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book"—and the famous debate in which these words occurred—in Boston in February, 1761—was the principal event which inaugurated the resistance of the Colonies to the oppressions of the Mother Country. "Then and there", said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

"*Obsta principiis*" was the warning cry of Mr. Justice Bradley in that case against encroachment upon constitutional privileges; and we may well conclude by repeating the language of Mr. Justice McKenna in the Wilson case:

"A limitation by construction of any of the constitutional securities for personal liberty is to be deprecated. A people may grow careless and overlook at what cost and through what travail they acquired even the least of their liberties. The process of deterioration is simple. It may even be conceived to be advancement, and that intelligent self-government can be trusted to adapt itself to occasion, not needing the fetters of a pre-determined rule. It may come to be considered that a constitution is the cradle of infancy, that a nation grown up may boldly advance in confident security against the abuses of power, and that passion will

not sway more than reason. But what of the end when the lessons of history are ignored, when the barriers erected by wisdom gathered from experience are weakened or destroyed? And weakened or destroyed they may be when interest and desire feel their restraint. What, then, of the end? Will history repeat itself? And this is not a cry of alarm."

We respectfully submit that for the reasons we have given the judgment of the court below should be reversed in both the Norcross and the Western Fuel cases.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

DAVID C. NORCROSS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

No. 2329

In the Matter of the Application of
David C. Norcross for Writ of
Habeas Corpus.

DAVID C. NORCROSS,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2328

WESTERN FUEL COMPANY,
(a corporation),

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2327

REPLY OF THE ASSISTANTS TO THE ATTORNEY
GENERAL, TO ARGUMENT MADE BY MR.
SAMUEL KNIGHT, ON BEHALF OF
APPELLANT AND PLAINTIFFS
IN ERROR.

The record shows (pp. 5-6) that prior to the proceedings here under review, three indictments had been presented to the District Court of the Northern District of California, by the grand jury, two in the November term, 1912, and the third during the March term, 1913. The defendants named in each of these three indictments were John L. Howard, James B. Smith, J. L. Schmitt, Robert Bruce, Sidney V. Smith, F. C. Mills, E. H. Mayer and Edward J. Smith, "all of whom are and were officers or employees respectively of said Western Fuel Company" (p. 6). Neither in the petition for the writ of habeas corpus, nor elsewhere in the record, is it shown which or how many of the parties under indictment were officers of said corporation, nor which of the parties were employees other than officers of said Western Fuel Company. The three indictments designated Exhibits "H", "I" and "K" are set out at pages 43 to 76 of the record. Exhibit "H" charges that the eight named defendants, on the first day of January, 1904, conspired among themselves and "with divers other persons whose names are to the grand jurors aforesaid, unknown, and for that

reason not herein set forth, to defraud the United States.”

It is next recited that the eight named conspirators and their fellow conspirators, under the guise and name of the Western Fuel Company, conspired to defraud the United States of import duties due on coal imported by said Western Fuel Company, and by others, by making and causing to be made, false weights and returns of coal thus imported, and further to defraud the Government by false weights and returns of coal loaded on vessels of the Pacific Mail Steamship Company and other vessels of American register, to the end that a greater rebate on drawback on coal duties might be secured from the Government.

The conspiracy of the eight named defendants, with other unknown fellow conspirators, is charged to have been in effect and operation from January 1, 1904, down to the 24th day of February, 1913.

Overt acts in execution of this conspiracy to defraud the Government, are charged in connection with coal loaded on vessels of the Pacific Mail Steamship Company, and the Toyo Kaisen Kaisha Company, and payments of bribes to the extent of two and one-half cents per ton are charged to have been made by defendants to engineers of vessels named in the indictment, in furtherance of the conspiracy, and for the purpose of concealing the facts from the Government.

Exhibit "I" alleges a similar continuing conspiracy from April 1, 1906, to February 18, 1913, among the same eight named defendants and with unnamed fellow conspirators, with a view to defrauding the Government out of import duties, and securing greater drawbacks on coal loaded on vessels of American register after being received at this port.

Exhibit "K" charges a like continuing conspiracy from April 1, 1906, to June 18, 1913, among the eight named defendants, and with unknown fellow conspirators, for the same general purpose of defrauding the Government alike in the matter of import duties and the drawbacks allowable where the coal was reloaded on vessels of American register.

Each indictment specifically charges conspiracy among the eight named defendants, and further charges that the conspiracy to defraud the Government involved other active conspirators than the eight named officers and employees of the Western Fuel Company.

After the filing of these indictments and in the month of August, 1913, subpoenas *duces tecum* were issued (pp. 39-43) out of the office of the Clerk of the United States District Court, requiring Norcross, as secretary of the Western Fuel Company, to produce before the grand jury all books, papers, records and documents of the company in use during the period of the conspiracy,

showing the coal received by the company, and likewise showing to whom the coal imported was subsequently delivered. The subpoenas, while confined to the period of the conspiracies, were so comprehensive in their terms that their validity was questioned on that ground, on the theory that enforced compliance with their terms would constitute an unreasonable seizure and search in contemplation of the fourth amendment to the Constitution of the United States.

It may be well to note here that no claim is made in this record on behalf of either appellant, or plaintiff in error, that any self incrimination, prohibited by the fifth amendment to the Constitution of the United States is involved in the proceedings.

At page 80 of his argument, Mr. Knight thus refers to this matter:

“In the present case, however, the demand for the books is made upon the owner, to wit: Western Fuel Company, through its secretary, the appellant herein, upon whom the subpoena was served, and he has acted throughout, not in an individual capacity, but wholly as secretary and on behalf of the Western Fuel Company. Neither that company nor its secretary, resist the production of the books on the ground that they would tend to incriminate any one, including themselves, which was the express ground of refusal alleged in the Wilson case, and which the court declined to sanction for the reason that a corporation cannot avail itself of the fifth amendment to the Constitution with respect to self-incrimination, and Wilson could not assert this alleged

privilege for the corporation. *Appellant and plaintiffs in error here are third parties to the main controversy between the United States and the directors and certain employees of that company*" (italics ours), "and the rights the firm assert are with respect to their own property and on behalf of themselves, and not on behalf of or with respect to the property of others."

In obedience to the subpoena, Norcross, the secretary, appeared before the grand jury on the 12th and 14th days of August, 1913, and was sworn as a witness (record pp. 81, 95).

It is admitted, as shown by the record at the pages indicated (pp. 81, 95), that on the occasions of the attendance by Norcross before the grand jury, he read a paper stating his ground for refusing to produce the records, in the following form:

"I have been instructed by counsel that I am not obliged, under this subpoena, to testify before the grand jury, nor to produce the books and papers of the Western Fuel Company accordingly; and without any disrespect to the grand jury, I must decline to testify further, or to produce the books and papers until the court has passed upon the matter."

Before Judge Dooling, Norcross further represented as follows:

(82) "It seems to me that it would be unreasonable to expect the company to turn over all of its books and especially at this time when the defendants have need of the

books and are making continual and daily use of them in preparing for their on-coming trials. * * * I have been informed by counsel, and upon such information and belief state the fact to be that a grand jury has no right to institute a new or supplemental investigation in the hope of eliciting additional testimony to supplement or strengthen the testimony upon which indictments have already been found, or in an attempt to aid the prosecutors in the trial of their case. Indictments should not have been returned in the first instance unless there was sufficient evidence on which to predicate them."

The witness, Norcross, at the same time, made further suggestions as to why, in his judgment, the grand jury should not be allowed an inspection of the books and papers covered by the subpoena.

In consequence of the stand taken by Norcross before the grand jury, a presentment was submitted by that body to the District Court, shown at pages 25 to 27 of the record, and known as Exhibit "C".

Among other things, that presentment shows that—

"in pursuance of said subpoena, said D. C. Norcross, as secretary of said Western Fuel Company, a corporation, appeared before said grand jury, at a session then being duly held by said grand jury, and was then and there duly sworn, by the foreman of said grand jury *to testify as a witness in an investigation then being pursued by said grand jury, concerning certain frauds alleged to have been*

perpetrated and committed by said Western Fuel Company against the United States (italics ours).

“That said D. C. Norcross, as secretary of said Western Fuel Company, a corporation, *refused to produce before said grand jury any of the books, papers or documents described and referred to in said subpoena, and during said session of said grand jury, said D. C. Norcross, as secretary of said corporation, would not, in obedience to said subpoena, produce said books, papers and documents, or any of them (italics ours).*

“That said D. C. Norcross, as such secretary, heretofore testified before said grand jury that he was, and had been, for many years, the secretary of said Western Fuel Company, a corporation, and that as such secretary he had, and still had the possession, custody and control of all said papers, records and documents referred to in said subpoena, excepting certain of said records destroyed in the fire of April 18, 1906, and that *he would not produce before said grand jury, in obedience to any subpoena served upon him, said books, records or papers, or any of them.*”

In speaking of the documents sought to be produced under the subpoena, Mr. Knight, at page 65 of his argument says:

“It is a matter of common knowledge spread broadcast by the public prints, that the defendants in the case about to be tried, have been indicted upon *evidence obtained entirely by entries in their own books which were voluntarily given to the officers of the Government when requested, and thereafter impounded by them for weeks at a time, with no*

opportunity afforded these defendants to explain how or under what circumstances these entries were made. * * *

“Is it to be wondered at that * * * the defendants should resent the improper use which had thus been made *of the books and papers which they had voluntarily furnished to the Government*, and insist on standing on their legal rights by declining to give the Government agents the opportunity to *again pry into their business affairs* with the hope that they might find there something that could be so twisted or distorted that could be made available at least by way of innuendo, if not evidence?”

At page 66, in speaking of the conduct of the Government, Mr. Knight says:

“A reasonable course for the Government to have followed, if it was in good faith *seeking to implicate others in the transactions complained of, or intending to find new indictments against those already under indictment*” (italics ours) would have been to postpone the effort before the grand jury and not wrest from these defendants *the means whereby they propose to assert their innocence, and explain the business transactions alleged to have been criminal.*”

At page 5 of his argument, referring to the books covered by the subpoena, which Norcross had failed to produce, Mr. Knight says:

“*The company had previously furnished the Government with all of its records which the latter had asked for.*”

After the presentment submitted by the grand jury, a hearing was had in the District Court be-

fore Judge Dooling. At the hearing an effort was made by counsel for Norcross and the Western Fuel Company to show that no charge against any person was pending before the jury when Norcross was sworn, and that no investigation of any pending or contemplated charge was in progress.

At page 91 of the record it appears that in response to a question by Mr. Knight, Mr. Sullivan, of counsel for the Government, said:

“To a certain extent there was a proceeding pending before the Grand Jury because Mr. Norcross had attended before the grand jury on two occasions before that and he was sworn and questioned and testified to a certain extent.

“Mr. KNIGHT. We merely want to get the fact before the court * * * that there was no proceeding *against these defendants, or any of them, pending nor had any charge been made against these defendants, or any of them, to the grand jury, at the time of the service of these subpoenas* (italics ours).

“(92) Mr. SULLIVAN. I will admit that at the time the subpoena was served there were no *formal proceedings pending against the Western Fuel Company, or against any of the defendants named in the indictment. That is as far as the Government will go. But I will state in good faith to counsel that there are other parties involved in this fraud who have not yet been indicted. And I will state that it is the intention of the Government to ascertain to what extent these other parties have been involved, and if their action is criminal, then the Government will take such course as it deems proper in the premises.*”

Following his investigation of the facts, Judge Dooling rendered a judgment which is shown at pages 18 to 24 of the record. Among other things Judge Dooling finds as follows:

(20) "In pursuance of said subpoena, said D. C. Norcross, as secretary of said Western Fuel Company, a corporation, appeared before said grand jury and was then and there duly held by said grand jury, and was then and there duly sworn by the foreman of said grand jury to testify as a witness *in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated against the United States*; that said D. C. Norcross, as secretary of the Western Fuel Company, a corporation, refused to produce before said grand jury at said time and place *and during such session, or during any other session of such grand jury, any of the books, papers, records, vouchers or documents referred to in said subpoena*; and during said session of said grand jury said D. C. Norcross, as secretary of the Western Fuel Company, a corporation, informed said grand jury and the members thereof, that *he would not, in obedience to said subpoena, produce said books, papers, records, vouchers and documents or any of them.*"

It is further shown at page 21 of the record that Norcross

"refuses to and will not produce before said grand jury, at any session to be held thereof, in obedience to *said subpoena so duly served upon him, or any other subpoena*, said books, papers, records, vouchers and documents, or *any of them*".

Said judgment further recites at page 23 that:

“said D. C. Norcross, as secretary of the Western Fuel Company, a corporation, although at all of said times having ability so to do, wilfully and contumaciously refused, and still refuses to obey said subpoena, or said order of this court, or to produce before said grand jury said books, papers, records, vouchers and documents, *or any of them*, so within his possession, or under his control”.

The entire conduct of Norcross and of the company, in the proceedings before the grand jury and before Judge Dooling, shows that the stand had been deliberately taken under advice of counsel; that no further production of any book, paper, record or document theretofore exhibited to the grand jury should be made either to the grand jury or the court, prior to the trial of the indictment theretofore filed against these eight named defendants.

Following the hearing before Judge Dooling and his judgment, a further opportunity was given for the production of the documents before the grand jury, which neither Norcross nor the company availed of, and finally the penalties for contempt were imposed by Judge Dooling.

The legal contentions made by Mr. Knight are:

(1) That there was no order or application to any court or judge for the issuance of a subpoena *duces tecum*;

(2) That the subpoena mentions no proceeding pending before the grand jury with reference to

which the production of the required documents was sought;

(3) That no charge had been presented to the grand jury, nor was any charge or investigation pending before that body with reference to which the documents sought were to be offered in evidence;

(4) That if the subpoena were properly issued, its terms were so broad as to constitute an unreasonable search and seizure in contemplation of the fourth amendment to the Constitution of the United States;

(5) That it does not appear that the documents covered by the subpoena were material or relevant to any charge or investigation pending before the grand jury.

We shall endeavor to take up the questions presented, in the order indicated by counsel:

I.

THE ISSUANCE OF THE SUBPOENA DUCES TECUM BY THE CLERK OF THE DISTRICT COURT, DURING THE SESSION OF THE GRAND JURY, AND FOR ITS PURPOSES, WAS AUTHORIZED BY LAW.

At page 11, Mr. Knight, as a heading for a subdivision of his argument, states the following proposition: "The issuance of the subpoena *duces tecum* was not properly authorized." The first sentence of his argument on that proposition is:

“The first reason assigned by us for maintaining that the subpoena was void is that it was not properly authorized or issued.”

At page 10, in stating the same proposition, counsel uses this language:

“1st. There was no order of, or application to any court or judge for the issuance of the subpoena *duces tecum*.”

The essential proposition thus stated by counsel in varying form, as we understand it, and as we shall deal with it in this subdivision of our argument, is purely one of *practice or procedure*.

As justifying our attitude toward the question and our understanding of counsel's position, we ask attention to the language used by him at pages 26 and 27 of his argument:

“I pass by this point without further discussion because it is the least important point in the case and only concerns the question of procedure; for if counsel for the Government could make a proper showing to the court below, that they were entitled to the subpoena *duces tecum* that court would undoubtedly make the necessary order.”

Inasmuch as counsel devoted nearly seventeen printed pages of argument to the question, we shall ask attention to the provisions of the law and some adjudications construing sections of the Revised Statutes of the United States, which are involved.

The power to compel the production of written evidence is as essentially inherent in a tribunal as

the power which enables it to compel the attendance and oral evidence of living witnesses.

The power to compel the production of written evidence is equally, if not more important than the power to compel the sworn language of a living witness.

In this connection we ask attention to some of the suggestions made by Mr. Chief Justice Marshall, sitting as circuit justice during the proceedings connected with the indictment by the grand jury and trial of Aaron Burr in the Circuit Court for the District of Virginia in the year 1807. Application had been made there to Judge Marshall to order the issuance of a subpoena *duces tecum* addressed to the president of the United States, compelling the production before the grand jury of certain documents desired by Burr in and of his defense. The particular proceedings to which we invite attention is case No. 14692 D, 25 Fed. Cas. 30, 34, 35. At page 34, the chief justice says:

“It remains to inquire whether a subpoena *duces tecum* can be directed to the president of the United States, and whether it ought to be directed in this case? This question originally consisted of two parts. It was at first doubted whether a subpoena could issue in any case to the chief magistrate of the Nation and if it could, whether that subpoena could do more than direct his personal attendance; whether it could direct him to bring with him a paper which was to constitute the gist of his testimony. While the argument was opening the attorney for the United States

avowed his opinion that a general subpoena might issue to the president, but not a subpoena *duces tecum*.

* * * * *

“(35) The court can perceive no legal objection to issue a subpoena *duces tecum* to any person whatever, provided the case be such as to justify the process. * * * A subpoena *duces tecum* varies from an ordinary subpoena only in this: that a witness is summoned for the purpose of bringing with him a paper in his custody. In some of our sister states, whose system of jurisprudence is erected on the same foundation with our own, this process, we learn, issues of course. * * * It has been truly observed that the opposite party can, regularly, take no more interest in the awarding a subpoena *duces tecum* than in the awarding an ordinary subpoena. * * * *He can no more object regularly to the legal means of obtaining testimony, which exists in the papers, than in the mind of the person who may be summoned. If no inconvenience can be sustained by the opposite party, he can only oppose the motion in the character of an amicus curiae, to prevent the court from making an improper order, or from burdening some officers by compelling an unnecessary attendance. This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defense.”*

The court there held that the subpoena *duces tecum* might be issued even to compel the production of papers by the president of the United States.

In considering the cases cited by Mr. Knight, as well as those suggested by ourselves, we ask the court to note the terms of the various provisions of the federal statutes under which the issuance of a writ has been allowed and in which the writ, after issuance, may have been quashed. The basic statutory provision under which writs of subpoena have been issued in the courts of the United States, is Section 716 Revised Statutes.

The language of that section is as follows:

“The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles of law.”

In re Storrer, 63 Fed. 564-66.

That was a motion to quash a subpoena *duces tecum* issued to the superintendent of the Postal Telegraph Company, requiring him to appear and produce before the United States grand jury certain telegraphic messages. District Judge Morrow, in passing on the application, said:

“The authority of the courts of the United States to issue subpoenas *duces tecum* appears to be derived from Section 716 of the Revised Statutes of the United States, which provides that the Supreme Court and the Circuit and District Courts shall have power to issue ‘all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to

the usages and principles of law. *At common law, every court having the power to hear and determine any suit had the inherent power to call for all adequate proofs of the facts in controversy; and to that end to summon and compel the attendance of a witness, and if the witness was expected to produce any books or papers in his possession, a clause to that effect was inserted in the writ which was then termed 'subpoena duces tecum'.* 1 Greenl. Ev. Section 309; 3 Bl. Comm. 382. The writ was of compulsory obligation. *Amey v. Long*, 9 East. 473."

In this same connection we ask attention to

American Lithograph Co. v. Werchmeister,
221 U. S. 608, 610.

In that case, Mr. Justice Hughes, speaking for the court, in discussing evidence afforded by books whose production in evidence had been compelled, by subpoena *duces tecum*, used this language:

"Without attempting to state in detail the proceeding which culminated in the introduction of the book entries in evidence, it is sufficient to say that after a review of the course of the trial, and of the directions and rulings of the court during its progress, we are satisfied that the enforced production of the books cannot properly be said to rest upon an order made under section 724, but that in fact they were produced under a subpoena *duces tecum* served upon the company's officer.

"But, it is urged, that the books were those of a party to the action, and hence that the limitations of section 724 must be deemed controlling; that in actions at law this section excludes all other modes of compelling pro-

duction of books or writings by the adversary party.

“Under Section 14 of the Judiciary Act of 1789 (Sec. 716, Rev. Stat.) power was conferred upon the federal courts to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the practice and usages of law. *This comprehended the authority to issue subpoenas duces tecum for ‘the right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law.’* *Amey v. Long*, 9 East. 484, Section 724, which was originally section 15 of the Judiciary Act of 1789, was to meet the difficulty arising out of the rules relating to parties at common law and to provide, by motion, a substitute *quoad hoc* for a bill of discovery in aid of a legal action.”

* * * * *

“*It was not the purpose of Section 724 to interpose an obstacle to the exercise of the general power of the court with respect to the issuance of subpoenas duces tecum, and that was not its effect.* The barrier, in the case of parties, existed independently of the provisions of the section and by these it was sought to mitigate the resulting inconvenience. When, however, the rule as to parties was changed it followed that the obstacle was removed and by virtue of the general authority of the court, subpoenas *duces tecum* may run to parties as well as to other—leaving those who are subpoenaed to attack the process if of improper scope or lacking in definiteness, or to assert against its compulsion whatever privileges they may enjoy. See *Merchants’ National Bank v. State National Bank*, 3 Cliff. 203, 204; *Nelson v. United States*, 201 U. S. 92.

“We conclude, therefore, that no question arises under *section 724, which cannot be regarded as providing an exclusive procedure.* The subpoena was valid; and the books called for were produced.”

Section 724, Revised Statutes,

is in this language:

“POWER TO ORDER PRODUCTION OF BOOKS AND WRITINGS IN ACTION AT LAW.

“In the trial of actions at law, the courts of the United States may, *on motion, and due notice thereof*, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue in cases and under the circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. *If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.*”

That section deals with what is commonly known as a motion to produce, directed by one party to the action, to his adversary, as distinguished from a subpoena *duces tecum* addressed to a witness as such requiring him to produce documents under his control, whether he be a party or not. The distinction between the two methods of enforcing the production of documentary evidence is noted in the language of Mr. Justice Hughes in the Werckmeister case, as above quoted. *The method* of securing the production in Section 724 is specifically

pointed out by the statute, as likewise *the penalty* for failure to comply with the notice. The party desiring production of books or writings under that section, must give his notice of motion as required by the section. If either party desires, as against the other, the enforcement of the statutory penalty, he must follow the statutory procedure pointed out before he can enforce the statutory penalty.

No such restricted mode of procedure is pointed out by Section 716 nor by any other provisions of the United States Statutes, as to the issuance by the court of a subpoena *ad testificandum* or a subpoena *duces tecum*. A subpoena of either class, without restriction or limitation by way of motion or notice therefore may be issued by the clerk as of course.

In this connection we ask attention to the case of *Johnson Steel Rail Co. v. North Branch Steel Co.*, 48 Fed. 191-2.

It was sought in that case to punish for contempt, a witness who had refused to produce documentary evidence in response to a subpoena *duces tecum*. In discussing the question presented, Judge Reed said:

“It was argued that the subpoena had improperly issued from the clerk’s office, that a subpoena *duces tecum* in such a case as the present, could only be issued by order of court upon petition or application of one of the parties. A circuit court in one district has

power, under the 67th rule in equity, to appoint a special examiner to take testimony in another district. * * *

“Nor do I think it necessary that in such a case an application must be made to the latter court for an order directing a subpoena *duces tecum* to issue, but *such a subpoena may be issued in the usual manner from the clerk’s office as in ordinary cases.*

(1) “If documents, the production of which is desired, are in the possession of one not a party to the suit, he may be compelled by a subpoena *duces tecum* to produce them, and if the subpoena is not obeyed, he will be punished for contempt on proof by affidavit that the documents are in his custody.’ 3 *Greenl. Ev.* 305. *Such subpoena is in ordinary and general use and is of compulsory obligation and effect in courts of law, and also in courts of equity;* and by the 78th rule in equity, subpoenas may be issued by the clerk in blank, and filled up by the commissioner, master, or examiner, requiring the attendance of the witness at the time and place specified, and this applies as well to subpoenas *duces tecum*. Section 869 of the Revised Statutes, providing for an order of court, upon which the subpoena *duces tecum* shall issue, applies to cases where depositions *de bene esse* are taken under the provisions of Section 863, or *in per petuam rei memoriam* and under a *dedimus potestatem*, under Section 866. It does not apply to testimony taken, as in the present case, under the general powers of a court of equity, and in the mode prescribed by the equity rules. An examination of the act of January 24, 1827, the second section of which was re-enacted as Section 869 of the Revised Statutes, shows that it was not intended to apply to all cases.”

Section 869 referred to by Judge Reed in the case last cited, points out the procedure to be followed in cases of depositions *de bene esse* under 863 R. S., and in depositions taken under a *dedimus potestatem, in perpetuam rei memoriam* under Section 866 R. S. In those cases the statute contemplates that the party shall apply in the first instance to a judge for the issuance of the subpoena. But the preliminary application contemplated by Section 869 does not apply to the ordinary subpoena compelling attendance in courts of law, or compelling a witness to produce documents in his custody.

At page 14 of his printed argument, Mr. Knight, in discussing this question of procedure cites *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. 153. An examination of the case shows that it is not in point. That was a petition for an order directing a clerk to issue a subpoena *duces tecum* for the taking of a deposition *de bene esse* under Section 863 R. S. No question of the necessity of a preliminary application was there involved. The matter before the court was the showing to be required *by the court* before it would *make its order* directing the clerk to issue the subpoena *duces tecum*.

The Boyd case, cited on page 12, was not a question of procedure at all. That was an information by the United States attorney in a case of seizure and forfeiture under Section 5 of the Revenue Act of June 22, 1874, which authorized

the court, on motion of the Government attorney, to require the defendant, or claimant of goods under seizure by the Government, to produce in court his private books, invoices and papers under a penalty that the allegation of the Government attorney should be taken as confessed and the goods involved finally subjected to forfeiture. The Supreme Court held the law unconstitutional, as being repugnant to the fourth and fifth amendments to the Constitution.

We have already shown by the language quoted from Mr. Knight's argument that the fifth amendment is not here in question. So far as the fourth amendment, referring to unlawful search and seizure is concerned, a discussion of that question, so far as appropriate, to the argument, falls properly under another subdivision, III, of this argument.

For this reason we shall not here consider the case of *Hale v. Henkel*, 201 U. S., cited by counsel at page 12.

The case of

U. S. v. Tilden, 10 Ben. 566, Fed. Cas. No. 16,522,

cited by Mr. Knight and also by Judge Colt in the Dancel case, decides nothing pertinent to the question of procedure here under consideration.

The full scope of the decision there made is indicated by the syllabus, which is in the following language (28 Fed. Cas. p. 174):

“A witness examined *de bene esse* under Rev. St. U. S. Sec. 863, may be compelled to produce books and papers in his possession which would be material and competent evidence for the party calling him, upon the trial of the cause, but he cannot be compelled to produce his books and papers merely for the purpose of refreshing his memory.”

It appeared in that case that the Government attorney conceded that the books and papers referred to were not competent evidence in the pending cause.

At page 18 of his argument, Mr. Knight refers to another case cited by Judge Colt,

Edison Electric Light Co. v. U. S. Electric Light Co., 44 Fed. 294.

The case is clearly not germane to the present discussion of our point of procedure. The gist of the decision is indicated by the following excerpt from the opinion (299-300):

“The refusal of the company’s officers to produce the documents in question under subpoenas *duces tecum* cannot therefore be excused upon the theory that they are privileged communications. The specific relief prayed for on this application is for an order—

“That the complainant consent that the commissioner of patents furnish to the defendant’s solicitors, at their expense, a certified copy of the file wrapper and contents of the pending application for letters patent filed in the patent office of the United States by Thomas A. Edison on the 15th day of December, 1880, the same being a division of an earlier application known as the ‘paper car-

bon application', filed by the said Edison on or about December 11, 1879, or, in lieu thereof, at complainant's option, that complainant produce, for the examination of defendant's counsel, and for use as evidence herein, if defendant be so advised, the full text, either original papers or copies, of said application, and of all correspondence in relation thereto which has passed between the patent office and the said Edison, or the complainant herein, or his or its attorneys.'

"Sufficient ground for the making of such an order, if it be within the power of the court to make it, is not shown. It does not appear that the commands of the subpoena *duces tecum* will not be ample to obtain such evidence as that described in the motion."

The case cited on page 22 (*U. S. v. Terminal R. Ass'n*, 154 Fed. 268) does not deal with the question of the issuance of a subpoena *duces tecum* by the clerk without preliminary application to the court. As a matter of fact, application had there been made to the court for the issuance of a subpoena *duces tecum*. Judge Finkelnburg, to whom the application was originally addressed, held that the showing of materiality made by the Government on its application for the writ was sufficient, and refused to quash the writ (148 Fed. 468-490). Subsequently District Judge Trieber, on motion to quash the same writ, held that the facts showing the materiality of the testimony in connection with the application for the writ were not sufficiently set out in the affidavit to enable the court to determine for itself the materiality and for that reason he granted the motion to quash.

At page 23, counsel cites *U. S. v. Hunter*, 15 Fed. 712. This case does not deal directly with the question of procedure here under consideration. The question there before the court arose on a motion to quash a subpoena *duces tecum* already issued to a witness in charge of a telegraph office, requiring production by him of telegrams sent or received at that office between certain specified dates. The motion was based on the grounds (1) of uncertainty of the subpoena; (2) irrelevancy to any proceeding or prosecution pending before the grand jury; (3) unwarranted disclosure without consent of parties, of contents of telegrams; (4) production of documents protected from disclosure by public policy. No reference whatever will be found in the case to any suggestion that a necessary preliminary to the issuance of a subpoena *duces tecum* by the clerk was an affidavit showing the materiality on an application to the court for a direction that the clerk issue the writ.

We make the additional suggestion that the ruling in the Hunter case is distinctly at variance with the rule followed by Judge Morrow in the Storrer case, above cited by us.

It would unduly extend this argument to take up each of the other cases cited by Mr. Knight under this heading. A thorough examination and analysis of each case would show that no case cited by him deals directly with the question of mere procedure or practice, to which we have endeavored to confine this section of our argument. We in-

sist that a subpoena *duces tecum*, requiring attendance and production of documents before a grand jury may be issued as of course by the clerk without any preliminary application therefor, by affidavit, motion or otherwise, to the court, in connection with which the grand jury is exercising its functions. Of course we realize that the court has control of process of this character, as of all other process and in a proper case, and on sufficient showing, may interfere with any unwarranted abuse of such process.

The general rule on this subject of summoning witnesses is thus referred to in

20 Cyc., 1342.

“The right to call witnesses before the grand jury is recognized both at common law and under statute; a very usual practice being for the prosecuting attorney to have such witnesses summoned as he believes necessary to support the bills to be laid before the grand jury.”

In speaking of the requisites of a subpoena *duces tecum*, the same authority says:

40 Cyc., 2169,

“Ordinarily a subpoena *duces tecum* is granted as of course and issued by the clerk of the court, although in some cases an order of court for the issuance of the process is required.’

The rule is thus referred to in

Thompson & Merriam on Juries, Sec. 640.

“WITNESSES CALLED IN DISCRETION OF PROSECUTING OFFICER. It is not usual for the court to give directions regarding witnesses to be called before the Grand Jury. The prosecuting attorney sends such as he believes to be necessary.”

To like effect see

State v. Wolcott, 21 Con. 279;

State v. Barnes, 23 Tenn., 5 Lea. 398-400;

O’Hair v. The People, 32 Ill. App. 277.

II.

THE AUTHORITY OF THE GRAND JURY TO EXAMINE ORALLY WITNESSES PERSONALLY PRESENT OR WRITTEN EVIDENCE PHYSICALLY PRODUCED, DEPENDS NEITHER ON THE SUGGESTION IN THE SUBPOENA, OF THE EXISTENCE OF A PENDING CHARGE OR PARTY CHARGED, NOR ON THE ANTECEDENT INITIATION OF AN INVESTIGATION BY THE GRAND JURY OF ITS OWN MOTION, OR OTHERWISE.

At page 10 of his printed argument, Mr. Knight says:

“Second. The subpoena does not state that there was any proceeding of any character pending before the grand jury for which the attendance of the witness, or the production of the books, papers and documents called for was required. No reference is made in the subpoena to any proceeding whatsoever before the grand jury.

“Third. No charge of any kind whatsoever had been presented by special counsel for the government, or by the district attorney, to the grand jury, nor was any charge then pending against anyone, or any investigation in any way, directly or indirectly, requiring the books, papers and records, or any of them, specified in the subpoena *duces tecum*, or in which any of these books or records could furnish any evidence, nor had the grand jury before it, of its own initiation, any proceeding of any kind whatsoever involving any matter or thing referred to in the subpoena.”

At page 27 his position on this matter is again stated in this language:

“There was no proceeding pending before the grand jury. The second and third objections which I have heretofore stated to the validity of the subpoena *duces tecum* may, for the sake of brevity, be considered together. These objections are that not only does the subpoena itself fail to state that any proceeding was pending before the grand jury, but as a matter of fact there was no proceeding of any kind so pending.”

At page 49 of his argument, counsel says:

“Persons called as witnesses before a grand jury are entitled to know either the names of parties against whom they are called to testify, or the nature of the charge that is made against known or unknown parties.”

The essential question here involved is rather one of personal privilege than one of power in a duly constituted tribunal to compel the presence of persons or papers.

To appreciate properly the cases cited under either or both of the second and third points suggested by Mr. Knight, it may be well to consider the nature of a grand jury as an independent functional factor in the administration of the criminal law, in aid of the courts of the United States.

A proceeding before a grand jury is not an action, either civil or criminal. A federal grand jury has the power and jurisdiction, in advance of any formal charge made by a prosecuting officer, to investigate on its own initiation or otherwise, as to whether any crime has been committed within the territorial jurisdiction of the court in whose aid it exercises its functions.

An early case in which the functions of a federal grand jury were discussed is

U. S. v. Hill, Case No. 15364; 26 Fed. Cas. 317.

There Mr. Chief Justice Marshall, sitting in the Circuit Court of the Virginia District for the May term of 1809, thus expressed himself:

“It has been justly observed that no act of congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are therefore, given by a necessary and indispensable impli-

eration. But, how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential. *Grand juries are accessories to the criminal jurisdiction of a court, and they have power to act, and are bound to act, so far as they can aid that jurisdiction*'' (italics ours).

In 1852 Mr. Justice Nelson, sitting in the Circuit Court for the Northern District of New York, in the case of

U. S. v. Reed, Case No. 16134; 27 Fed. Cas. 727, 737,

speaking of procedure before federal grand juries said:

“There are no authorities to be found in the English books upon this question; as the mode of proceeding before the grand jury in England, in finding bills of indictment, differs from the practice usually adopted in this country. There, the indictment is drawn by the proper officers before the case is presented for examination, and the witnesses are sworn in the particular case. *Here, the initiation of the proceedings is by swearing the witnesses and sending them before the grand jury, and the bill is drawn after they have agreed upon it. There is no cause pending in court, or even before the grand jury, in the legal sense of the term, at the time the witnesses are sworn, and, in consequence, no title to the proceedings can properly be given, or be necessary to the validity of the oath. If the person to be accused before the grand jury is named, it is simply for the purpose of giving application to the oath, or to the evidence under it; and, as we have seen, this application has been regarded*

as sufficiently direct and explicit *when the oath is administered generally, and as relating to all persons concerning whom charges are to be made before that body*" (italics ours).

U. S. v. Brown, Fed. Cas. 14671, Vol. 24, p. 1273-4.

That case arose in the Oregon District of the Ninth Circuit before Deady, District Judge. It was there sought to quash an indictment on the ground that it had been found by the grand jury on the testimony of some of the parties indicted, in violation of the statute which provided that "a defendant in a criminal action cannot be a witness for or against himself, nor for or against his co-defendant." Several of the parties jointly indicted had been examined before the grand jury in the investigation which resulted in the indictment. In disposing of the motion to quash the indictment, Judge Deady said:

"I cannot conceive of any one being a defendant until some distinct action or proceeding known to the law has been commenced against him, to which he then becomes a party and in which he is entitled to be heard as soon as he is brought into court, or chooses to appear. Section 11 of the Criminal Code provides substantially that a criminal action is commenced when the indictment is found and filed with the clerk. So in U. S. v. Reed, cited above, it was held that while an investigation was going on before the grand jury touching a particular charge, there was no cause pending in court or before that body in the legal sense of the term. There are, in fact

or law, no defendants or co-defendants to an investigation before a grand jury touching an alleged or supposed commission of crime.

* * * * *

“Neither of these defendants was charged with the commission of a crime until after this investigation had ceased, and the indictment was filed in court. Then for the first time in a legal sense they were accused of the commission of a crime. Section 48 only applies to cases when a party has been duly charged with the commission of crime before a committing magistrate and held to answer. In such a case the grand jury are called upon to inquire whether the defendant in this criminal proceeding before the magistrate is *prima facie* guilty, as charged, and indorse the indictment accordingly. But in a general inquiry instituted by a grand jury for the purpose of ascertaining who committed a particular crime, or whether a crime was committed at all, it would be impossible to apply section 48, without stopping the inquiry at the threshold. The grand jury cannot know at once who will be the person put on trial for the crime, and who will be his co-defendants if any, and therefore cannot know if the testimony of either would be incompetent on the trial on that account, and for that reason not to be received by them on the investigation.”

Thompson & Merriam on Grand Juries,
Sec. 626.

In speaking of the different form of oath administered under the English practice from that here administered, this authority says:

“In England, a bill of indictment is prepared in the case of each accused person, and

sent to the grand jury as the basis of their investigations. With us, the charge is made, fully considered and sustained by the grand jury before a formal indictment is drawn. As a result, in England 'each witness, before he leaves the court, is sworn that the evidence he shall give to the grand inquest upon the bill of indictment against the defendant, shall be the truth, the whole truth, and nothing but the truth.' *Under our system, there is no cause pending in court, or even before the grand jury, in the legal sense of the term, at the time the witnesses are sworn, and, as a consequence, no title to the proceedings can properly be given, or be necessary to the validity of the oath.* In other words, a general form of oath, to give evidence touching criminal charges to be laid before the grand jury, *without reference to any particular person, is sufficient."*

The same authority, in discussing the manner in which indictments of the grand jury originate, in section 611, says:

"Indictments, however, originate with the grand jury in a variety of ways, which will now be noticed: 1. By the court giving a matter of general notoriety specially in charge. 2. By the exercise of powers, *ex officio*, of the prosecuting officer. 3. From the knowledge of the grand jury. 4. By the exercise of general or special inquisitorial powers by that body."

* * * *

The same authority, in section 614, in speaking of presentment upon knowledge of the grand jury, on the grounds of this knowledge, says:

“The grand jury, from the earliest times, has preferred charges founded upon the knowledge of members of the body.”

In 1868, Mr. Chief Justice Chase, sitting as Circuit Justice in the District of West Virginia, *30 Fed. Cas. 980*, thus charged the grand jury:

“Your general duties are sufficiently defined by your oath. * * * The same oath binds you to diligent inquiry as well as true presentment.

“You will not acquit yourselves of these obligations by slight or careless investigation. You must not be satisfied by acting upon such cases only as may be brought before you by the district attorney, or by members of your body to whom knowledge of particular offenses may have come. Your authority and your duty go much further. You may, and *you should, summon before you officers of the government, and others whom you may have reason to believe possess information proper for your action, and examine them fully.* Officers connected with the collection of internal revenue—collectors and assessors and their subordinates—may with special propriety be thus examined.

“In respect to the mode and extent of your inquiries, your own good sense will be your best guide. The district attorney will always be ready to aid you with information on matters of law; and the court also will take pleasure in responding to any inquiries you may see fit to make.”

This language of the Chief Justice addressed to the grand jury shows clearly that that body was not only permitted, but expected under their oaths, to

exercise inquisitorial powers. They were informed it was their duty to consider not only matters submitted to them by the district attorney, but also to institute original investigations on their own account, to determine whether criminal offenses had been committed within the territorial jurisdiction of the court.

A charge frequently referred to in the discussion of the oath of grand jurors, and the scope of the investigation properly within the functions of such bodies, is that given by Mr. Justice Field in the Circuit Court of the California District in August, 1872, 30 Fed. Cas. 993-4.

At page 993, the grand juror's oath is set forth in the following language:

"You, as foreman of this inquest for the body of the District of California, do swear that you will diligently inquire and true presentment make, of such articles, matters and things as shall be given in your charge, *or otherwise come to your knowledge, touching the present service.* The Government's counsel, your fellows', and your own, you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unrepresented for fear, favor, affection, hope of reward or gain, but shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God.

* * * * *

"The Government has appointed the District Attorney to represent its interests in the prosecution of parties charged with the commission of public offenses against the laws of

the United States. He will, therefore, appear before you, and present the accusations which the Government may desire to have considered by you. He will point out to you the laws which the Government deems to have been violated; and *will subpoena for your examination such witnesses as he may consider important, and also such other witnesses as you may direct.*

* * * * *

“How far you should proceed to inquire into other matters than such as are brought to your consideration by the Government, through its prosecuting officer, the District Attorney, has been a matter of much conflict of opinion among different judges.

* * * * *

“Your oath requires you to diligently inquire, and true presentment make, ‘of such articles, matters and things as shall be given you in charge, or *otherwise come to your knowledge touching the present service.*’

“The first designation of subjects of inquiry, are those which shall be given you in charge; this means those matters which shall be called to your attention by the court, or submitted to your consideration by the district attorney. The second designation of subjects of inquiry are those which shall ‘*otherwise come to your knowledge touching the present service;*’ this means those matters within the sphere of, and relating to your duties which shall come to your knowledge other than those to which your attention has been called by the court, or submitted to your consideration by the district attorney.

“*But how come to your knowledge?*

“Not by rumors and reports, but by knowledge acquired from the evidence before you, or from your own observations. Whilst you

are inquiring as to one offense, another and a different offense may be proved, or witnesses before you, may, in testifying, commit the crime of perjury.

“Some of you, also, may have personal knowledge of the commission of a public offense against the laws of the United States, or of facts which tend to show that such an offense has been committed, or possibly attempts may be made to influence corruptly or improperly your action as grand jurors. If you are personally possessed of such knowledge, you should disclose it to your associates; and if any attempts to influence your action corruptly or improperly are made, you should inform them of it also, and they will act upon the information thus communicated as if presented to them in the first instance by the district attorney.

“But unless knowledge is acquired in one of these ways, it cannot be considered as the basis for any action on your part.

“We, therefore, instruct you that your investigations are to be limited. First, to such matters as may be called to your attention by the court; or, second, may be submitted to your consideration by the district attorney; or, third, may come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or, fourth, may come to your knowledge from the disclosures of your associates.

“You will not allow private prosecutors to intrude themselves into your presence, and present accusations. Generally such parties are actuated by private enmity, and seek merely the gratification of their personal malice.

* * * * *

“You are also to keep your own deliberations secret; you are not at liberty even to state that you have had a matter under consideration. Great injustice and injury might be done to the good name and standing of a citizen if it were known that there had ever been before you for deliberation the question of his guilt or innocence of a public offense. You will allow no one to question you as to your own action or the action of your associates on the grand jury.”

This charge of Mr. Justice Field to the California grand jury indicates equally with that of Chief Justice Chase the duty of the grand jurors to conduct original investigations on their own account. The only limitation imposed by the learned justice, to the scope of their inquiry—to the extent of their inquisitorial powers—was that they should not permit private prosecutors, as a means of wreaking individual vengeance, to invade the precincts of the grand jury for the purpose of making accusations in matters not otherwise called to the attention of the jurors. We ask special attention to the binding obligation of secrecy as to matters and citizens under investigation in view of the persistent claim of counsel that the grand jury is under necessity of specifying in its process of subpoena the name of the party under investigation and the character of the charge which may possibly at a later date be the basis of an indictment.

O’Hair v. The People, 32 Ill. App. 277.

In that case a witness had been served with a subpoena a few days before the court convened for

the term during which the grand jury was about to be called upon to sit. After the service, he left the state and remained away until after the discharge of the grand jury, at whose session the subpoena had required his attendance. The state's attorney procured from the court an attachment upon which the witness was brought into court and fined. From the decision of the court in imposing this fine in consequence of his contempt in disobeying the process, the witness appealed. In sustaining the judgment imposing the fine, the Appellate Court said:

"No statute directly authorizes the issuing of subpoenas in such cases, nor has our attention been called to any adjudicated case where this precise question was involved. It is insisted by counsel for appellant that no power exists in the state's attorney to cause subpoenas to be issued prior to the organization of the grand jury; that there is no cause or action in existence authorizing the issuance of subpoenas until the grand jury has actually begun the investigation of an alleged offense. This, in our judgment, is a misapprehension of the relative powers and duties of the state's attorney and the grand jury."

The judgment was there affirmed.

State v. Wolcott, 21 Con. 279.

In that case the court said:

"Grand juries have a right to investigate offenses and present bills of indictment against persons at large, as well as those in custody or on bail. *They have a right to originate charges against offenders without forewarning them of proceedings against them.*"

INQUISITORIAL POWERS OF GRAND JURY.

Under our American system, the grand jury exercises inquisitorial powers. As a matter of necessity, in the exercise of such power, it must investigate matters in advance of and prior to the formation of any specific charge against a designated person supposed to be guilty under such charge.

A recent New York case is entitled

In re Osborne, 117 N. Y. S. 169, 171-5.

At pages 170-1, the court said:

“Grand jurors are ‘clothed by the common law with inquisitorial powers, and of their own motion may make full investigation to see whether a crime has been committed, and, if so, who committed it. They may investigate on their own knowledge, or upon information of any kind derived from any source deemed reliable, may swear witnesses generally, and may originate charges against those believed to have violated the criminal laws.’

* * * * *

“The material inquiry in this connection is, not what was the purpose of the district attorney in causing the alleged subpoenas to be issued, but what was the nature of the inquiry which the grand jury was consciously entering upon. There is nothing to show that in the matter of these subpoenas the grand jury had any other purpose than to discharge the duties devolved upon them by law.

* * * * *

(175) “A defendant may be indicted under a fictitious name, and, when his real name becomes known, this may be inserted in the indictment. (Code Cr. Proc. Sec. 277; and,

where such discovery is only made at the trial, witnesses subpoenaed to attend the trial must of necessity be subpoenaed in a cause entitled in the fictitious name. *It is plain, however, that no witness can decline to obey a subpoena upon such a ground.* It is plain that, if a grand jury did not know a defendant's name at the time of making an investigation with a view to determining whether or not an indictment should be found, and it were, nevertheless, required in such case to use the accused's true name in a subpoena, they could subpoena no witnesses because of lack of such knowledge.

* * * * *

“The form of subpoena in the federal courts is not prescribed by statute; and it is, therefore, appropriate that the federal courts should do by rule and decision that which in this state is done by statute, namely, prescribe the form of the writ.”

A case which in its final stages assumed national importance on account of its decision by the Supreme Court, was first determined by the Circuit Court in the Southern District of New York. It is entitled

In re Hale, 139 Fed. 496.

In that case the witness had been served with a subpoena *duces tecum* to appear before the federal grand jury. He declined to testify on the ground

“1. That *the grand jury could only investigate specific charges against particular persons*, and as there was not any proceeding of that nature before them and no cause of action of any kind whatever pending in the court, they were not in the exercise of proper authority in

prosecuting the investigation when petitioner was before them, and consequently *he could not be lawfully required to testify or give evidence.*”

Petitioner also alleged that enforcement of the subpoena was in violation of his rights under the fourth and fifth amendments to the Constitution.

In discussing the objection that no specific charge was under investigation, the court said:

(498) *“The authority and functions of a grand jury in the courts of the United States in investigating criminal offenses are not prescribed by statute, but are such as inhere in that body by the general sanction of the common-law courts. That a grand jury is not confined to the investigation of an alleged offense to which their attention has been called by the court, or which has been laid before them in an indictment, or an information by the prosecuting attorney of the court, or which is within the personal knowledge of some of the members, is the generally accepted opinion of the courts of this country, unless in some of the states where there may be statutory restrictions to the contrary. As said by Mr. Justice Brewer in Frisbie v. The United States, 157 U. S. 160., 15 Sup. Ct. 586, 39 L. Ed. 657:*

“‘In this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and, after determining that the evidence is sufficient to justify putting the party suspected to trial, to direct the preparation of the formal charge or indictment.’

“That they may investigate into offenses which may come to their knowledge, other than those to which their attention has been called

by the court, or which have been submitted to their consideration by the district attorney, is shown by the observations of Mr. Justice Field in a carefully considered charge to the grand jury in the United States Circuit Court for the District of California. 2 Sawy. 667 Fed. Cas. No. 18,255. That a grand jury has certain inquisitorial powers—and by this is meant the power of instituting an investigation to discover whether a particular crime has been committed—is also a proposition which has been frequently affirmed by the courts of this country.”

While in some particulars Circuit Judge Wallace disagreed with the action of another Judge of the same circuit as to some of the principles involved, he nevertheless refused to discharge the prisoner on habeas corpus. The appeal from his action is reported in 201 U. S. 43 et seq., under the title

Hale v. Henkel.

The case was presented in the United States Supreme Court by Mr. DeLancey Nicoll and associates. The report of the argument, as shown at page 47, indicates that the following points were presented to the Supreme Court:

“There were no facts authorizing the Circuit Court to entertain *any charge against appellant*. Unless the grand jury in prosecuting the investigation acted within its jurisdiction, the court had no authority to punish the witness for his supposed contumacy in refusing to answer questions (citing cases).

“*No judicial matter was pending in the Circuit Court* when appellant was required to attend before the grand jury, or when the orders

of May 5 and May 8 were made, in or upon which he could lawfully be required to testify or produce evidence.

“Notwithstanding the subpoena said ‘in a certain action,’ *no action was pending*; there can be no action, prosecution or criminal proceeding, until after someone has been formally accused of acts constituting a criminal offense by indictment or by information.

“*Nor was there any particular charge against the corporations named in the subpoena duces tecum, or under investigation.* The grand jury was merely engaged in an effort to find out whether they had or had not transgressed the Sherman Act.

“An *ex parte* investigation, based upon mere suspicion, without any complaint or charge, and that may be without result, is not a ‘case’ or ‘controversy’ within the meaning of the Constitution (citing cases).

“The grand jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation; consequently its requirement, and the orders of the court, based upon it and the witness’s refusal, were *coram non judice* and void.”

At pages 58 and 59 Mr. Justice Brown speaking for the court says:

“The appellant justifies his action in refusing to answer the questions propounded to him, 1st, upon the ground that there was *no specific ‘charge’ pending before the grand jury against any particular person.*”

At page 62 the learned justice continues:

“While no case has arisen in this court in which the question has been distinctly presented, the authorities in the state courts

largely preponderate in favor of the theory that the grand jury may act upon information received by them from the examination of witnesses *without a formal indictment, or other charge previously laid before them.*"

At page 63, after quoting the language of Mr. Justice Brewer, above quoted, Justice Brown continues:

"There are doubtless a few cases in the state courts which take a contrary view, but they are generally such as deal with the abuses of the system, as the indiscriminate summoning of witnesses with no definite object in view and in a spirit of meddlesome inquiry."

At page 65 the justice continues:

"We deem it entirely clear that under the practice in this country, at least, the *examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed*; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them. So valuable is this inquisitorial power of the grand jury that, in States where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to courts of impanelling grand juries for the investigation of riots, frauds and nuisances, and other cases where it is *impracticable to ascer-*

tain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted."

The power of the grand jury is, beyond all question, in the view of the United States Supreme Court, an inquisitorial power. The law cannot require the absurdity that a specific charge shall be pending against a particular person before a witness may be summoned for an investigation, where the very existence of the charge can only follow as the ultimate result of the investigation and the testimony given by the witnesses. The law cannot require that the process by which the attendance of a witness shall be compelled, shall specify the name of the party, then unknown, who may be subsequently determined to be the object of an indictment found by the grand jury as a result of the investigation. A specific charge involves definiteness, both as to the party and the offense charged. Neither is possible in advance of the investigation or the inquisitorial examination proper to be made by a grand jury.

Wilson v. United States, 221 U. S. 361.

In that case the witness, as in the case at bar, declined to answer questions before the grand jury on the ground that no specific charge was pending. The contention of the witness was overruled. The

first subdivision of the syllabus, which is fully borne out by the decision, is in this language:

“Hale v. Henkel, 201 U. S. 43, followed to the effect that a witness properly subpoenaed cannot refuse to answer questions propounded by the grand jury, on the ground that there is no cause or specific charge pending.”

Among the cases cited by counsel for the contemnor in that case was *In re Shaw*, 172 Fed. 520, which is the same case cited by counsel at pages 39 and 49 of his argument, under the title *In re McLaughlin*, 172 Fed. 520. Mr. Justice Hughes who delivered the opinion of the court, in speaking of this question said:

“Wilson then petitioned for a writ of habeas corpus alleging that the commitment was illegal for the reasons (1) that the court was without jurisdiction to entertain the charge of contempt, (2) that there was no ‘cause’ or ‘action’ pending in the court between the United States and any party mentioned in the subpoena, in which the petitioner could be required to testify or give evidence.”

At pages 371-2, the justice continues:

“We may first consider the objections to the validity of the subpoena and then the claim of privilege.

“The objections to the jurisdiction on the ground that there was no ‘cause’ or ‘specific charge’ pending before the grand jury were made and answered in *Hale v. Henkel*, 201 U. S. 43, and require no further examination.”

At page 49 of his argument, Mr. Knight says:

“It is apparent, as the Circuit Court for the Southern District of New York said in the Shaw and McLaughlin cases, *supra*, that persons called as witnesses before a grand jury are entitled to know either the names of the parties against whom they are called to testify, or the nature of the charge that is made against known or unknown parties.”

In response to a suggestion of this kind in the Wilson case, Mr. Justice Hughes said:

“It is said that, under the form of writ used in this case, the defendant in the prosecution which might follow an indictment by the grand jury would not be apprised of the name of the precise witness who might have appeared against him, and section 829 of the Revised Statutes and the Sixth Amendment of the Federal Constitution are invoked. The contention ignores the fact that *the writ calls for books and not for oral testimony; and, aside from this, neither the constitutional provisions nor the statute accords the right to be apprised of the names of the witnesses who appeared before the grand jury.* Even in cases of treason and other capital offenses, under section 1033 of the Revised Statutes, the required *list of witnesses is only of those who are to be produced on the trial*” (citing cases).

Hale v. Henkel and *Wilson v. United States* were followed by the Circuit Court for the Southern District of New York in the case entitled

In re Born Hat Co., 184 Fed. 506,
that case was affirmed on appeal by a memorandum opinion shown at 223 U. S. 714.

THE FACTS OF THE PENDENCY OF AN INVESTIGATION BEFORE THE GRAND JURY, THE MATERIALITY OF THE DOCUMENTARY EVIDENCE REFERRED TO IN THE SUBPOENA, AND THE REASONABLENESS OF THE TIME ALLOWED NORCROSS TO PRODUCE THE DOCUMENTS WERE MATTERS PROPERLY DETERMINABLE BY THE DISTRICT COURT AND NOT PROPERLY REVIEWABLE HERE.

The grand jury in its deliberations, it is true, acts to some extent independently of the court, but it is nevertheless unquestionably an adjunct or appendage of the court, aiding it in the administration of the criminal law. It has no power to adjudge contempts or to punish the same. Where a witness already sworn and present within the acknowledged jurisdiction of the inquisitorial body, declines to observe either his duty to testify or to produce documents whose production is ordered by it, the only way to penalize him for his contumacy is to report his conduct to the court and ask, at the hands of the court, the appropriate order in the premises. The punishable contempt here in question was the final refusal of Norcross to comply with the order of the District Court made after the hearing and the finding by Judge Dooling that Norcross, the contemnor, had appeared before the Grand Jury and been sworn, and testified to some extent, and been directed by the court to produce the documents before the grand jury.

We have contended, and still contend that there was no defect in the form or substance of the subpoena so far as its function was to insure the per-

sonal' presence of Norcross. He was physically within their presence and subject as a witness to the proper direction of the grand jury. If he had not been subpoenaed at all, being personally present and being a competent witness, it certainly was within the power and function of the grand jury to cause him to be sworn as a witness. If any seeming or substantial defect existed in the subpoena so far as securing his personal presence was concerned, the process was *functus officio*. It is no defense on the part of a contumacious witness who receives an order properly made by a court, that he had not been served with a subpoena requiring his attendance, or that the subpoena served upon him was defective in form or substance.

If he is before the court, a competent witness, the court, in the exercise of its unquestioned powers, may cause him to be sworn. If he be sworn, he is equally, with any other witness, subject to the proper order or direction of the court. Neither to the grand jury, nor to the court, was Norcross in a position to claim that his stand before the court and jury was not that of a witness subject to such orders as might be properly addressed to him. In speaking of a witness who defied the authority of a grand jury, the California Supreme Court said in

In re Gannon, 69 Cal. 543,

“There is no doubt that a grand jury is part of the court by which it is convened, and that it is under the control of the court; and

there is just as little doubt that a witness who appears before it is subject to the lawful authority and control of the court in the same manner and to the same extent as are witnesses before a trial jury. The court has, therefore, jurisdiction to deal with a witness who defies the authority of the grand jury, and to adjudge him guilty of contempt of court for such conduct, and punish him; and if no excess of jurisdiction appears in the proceedings, or which resulted in the conviction and punishment, the judgment rendered is final and conclusive, and not the subject of review."

The judgment of contempt here under attack shows (20-2) that on said 14th day of August, 1913,

"said D. C. Norcross, as secretary of said Western Fuel Company, a corporation, appeared before said grand jury and was then and there being duly held by said grand jury and was then and there duly sworn by the foreman of said grand jury to testify as a witness in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated against the United States".

The record further shows that on the 14th day of August the court gave and made its order directing the witness to show cause on the 18th day of August why he should not be punished for contempt. It is further shown at page 22 that on September 3, 1913, after a full hearing had in the matter, the court gave further direction that Norcross should appear and produce the books, papers and records before the grand jury at a session to be held on the next day, September 4th. This or-

der of September 3rd was served on Norcross but he refused to comply with its terms, stubbornly holding to the position that under no subpoena, and under no order of court would he comply with the direction that he produce the books, papers and documents of the Western Fuel Company for the inspection of the grand jury.

Under this branch of our discussion, the court will bear in mind that we are considering only the question of practice arising on the claim of counsel that the court was without jurisdiction for the reasons:

1. That the subpoena recited neither a specific charge nor a specific defendant; and
2. That no specific charge was actually under investigation by the grand jury.

The larger question of unlawful search or seizure in contemplation of the fourth amendment is reserved for the next subdivision of our argument.

We insist that as to the reasonableness of the time allowed for production of the books and papers, the pendency of an investigation, the materiality of the documents mentioned in the subpoena in the investigation found by the court to be in progress, the district court was acting within the unquestioned scope of its jurisdiction and this appellate tribunal should not review or disturb the action of that court in the premises.

REASONABLENESS OF TIME ALLOWED FOR PRODUCTION OF
DOCUMENTS.

The entire record will warrant our claim that the time allowed for the production of the books and papers was not a substantial or real reason for the refusal of Norcross or the Western Fuel Company to produce the books called for by the subpoena. At all events, the question of the reasonableness of time could not affect the jurisdiction of the District Court.

In this connection we ask attention to a few of the expressions made by the justices in the case of

Hale v. Henkel, 201. U. S.

At page 70 Mr. Justice Brown in the main opinion says:

“The second branch of the case relates to the non-production by the witness of the books and papers called for by the subpoena *duces tecum*. The witness put his refusal on the ground, first, that it was impossible for him to collect them within the time allowed; second, because he was advised by counsel that under the circumstances he was under no obligation to produce them; and finally, because they might tend to incriminate him.

“Had the witness relied solely upon the first ground, doubtless the court would have given him the necessary time.”

At page 78, Mr. Justice Harlan says:

“It may be, I am inclined to think as a matter of *procedure and practice*,” (italics ours) “that the subpoena *duces tecum* was too broad and indefinite. But the action of the

court in that regard was, at the utmost, only error, and that error did not affect its jurisdiction to make the order, nor authorize the witness—whose personal rights, let it be observed, were in no wise involved in the pending inquiry—to refuse compliance with the subpoena, upon the ground that it involved an unreasonable search and seizure of the books, papers and records of the corporation whose conduct, so far as it related to the Sherman Anti-Trust Act, was the subject of examination. It was not his privilege to stand between the corporation and the Government in the investigation before the grand jury.”

At pages 79-80, Mr. Justice McKenna said:

“If there was a violation of the Anti-Trust Act, that is, combinations in restraint of trade, it would be probably evidenced by formal agreements, but it might also be evidenced, or its transactions alluded to in telegrams and letters, *sent during the time the combination operated. Each telegram, each letter, would contribute proof and therefore material testimony.* Why then should they not be produced? What answer is given? It is said the subpoena is tantamount to requiring all the books, papers and documents found in the office of the MacAndrews & Forbes Company, and an embarrassment is conjectured as a result of its business. These, then, I assume, are the detrimental consequences that will be produced by obedience to the subpoena. *If such consequences could be granted, they are not fatal to the subpoena.* But they may be denied. There can be at most but a temporary use of the books, and *this can be accommodated to the convenience of parties. It is a matter for the court, and we cannot assume that the court would fail of consideration for*

the interest of parties or subject them to more inconvenience than the demands of justice may require.

“I cannot think that the consequences mentioned are important or necessary to the argument.”

The real insistence of these contemnors was essentially that at no time and in response to no subpoena or order of court would Norcross, the secretary of the Western Fuel Company allow the books or records of the corporation to be produced before the grand jury while the *third parties* the eight named defendants charged with conspiracy insisted on their non-production.

NEITHER THE BROAD TERMS OF THE SUBPOENA NOR THE ALLEGED IMMATERIALITY OF THE DOCUMENTARY EVIDENCE REFERRED TO IN THE SUBPOENA, AFFORDED A GROUND FOR ATTACKING THE JURISDICTION OF THE DISTRICT COURT IN GIVING ITS JUDGMENT FOR CONTEMPT.

In the case of *Hale v. Henkel* (201 U. S. 77), Mr. Justice Brown intimated that in his judgment the subpoena there served was too broad in its terms. Nevertheless after referring to the broad terms of the subpoena he concluded the opinion in this language:

“But this objection to the subpoena does not go to the validity of the order remanding the petitioner, which is therefore affirmed.”

Mr. Justice McKenna in the case of

Nelson v. U. S., 201 U. S. 114-115,

thus refers to the question of materiality:

(p. 114) "*The claim of immateriality of the testimony cannot avail plaintiffs against the orders of the circuit court.*"

After referring to the powers exercised by an examiner in taking testimony and noting exceptions, the justice continues:

"And an application to a court to compel delivery of testimony in aid of the examiner does not change the rule. The testimony is taken to be submitted to the court where the suit is pending and *all questions upon the evidence, its materiality and sufficiency are to be determined by it and after it, by an appellate court.* * * *

"These writs of error are not prosecuted by the parties in the original suit but *by witnesses to review a judgment of contempt against them for disobeying the orders to testify. Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issues between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal.*"

See also in this connection,

Alexander v. U. S., 201 U. S. 117-122.

A more recent case dealing with this question is

Consolidated Rendering Co. v. Vermont, 207 U. S. 541-556; 52 L. Ed. 327-337.

In that case Mr. Justice Peckham, after referring to the broad terms of the notice calling for the

production of papers, thus speaks to this same question:

“The company refused to produce the books (with the exceptions stated) and even *if the notice had been too broad, the objection cannot be urged as to the validity of the order adjudging the company guilty of contempt. Hale v. Henkel*, 201 U. S. 43; 50 L. Ed. 652; 26 Sup. Ct. Rep. 370. But unless it can be said that a court or grand jury never has any right to call for the books and papers or correspondence between certain dates and certain persons named, in regard to a complaint which is pending before such court or grand jury, we think the objection here made is not well founded. *We see no reason why all such books, papers and correspondence which related to the subject of inquiry and were described with reasonable detail should not be called for and the company directed to produce them.* Otherwise the state would be compelled to designate each particular paper which is desired, which pre-supposes an accurate knowledge of such papers, which, the tribunal desiring the papers, would probably rarely, if ever, have.”

A still more recent case is

Wheeler v. U. S., 33 Sup. Ct. Rep. 158-161.

At page 161 Mr. Justice Day says:

“The proposition that the orders of the court of commitment and imprisonment deprived defendants of their liberty without due process of law seems to be based upon the contention that the corporation was in no way obliged to obey the subpoena, and that, after its dissolution, it was not subject to any subpoena requiring the production of books and papers before the

grand jury. But we do not think there is any merit in this objection. If the government had the legal right to demand the production of the books and papers in question, with a view to the investigation of the alleged offense of Wheeler and Shaw in the proceedings before the grand jury, *whether the subpoena was drawn in proper form or not*, or whether the corporation, in view of its dissolution, could have been compelled to comply with its requirements, *in the attitude which the case has taken, is immaterial*. It is apparent from the facts already recited that Wheeler and Shaw were required by the subpoena *duces tecum* to bring before the grand jury the books and papers of the corporation which had been dissolved, and that *they so understood the subpoena*; that they were in possession of such books and papers which could be by them produced before the grand jury, and that, *before the order of commitment was made, the defendants were allowed a full hearing in a court of competent jurisdiction.*"

These recent adjudications by the Supreme Court of the United States fully justify our contention that neither unreasonableness, nor lack of definiteness in the terms of the subpoena, nor broadness of the terms used in describing the documents required, nor the materiality of the evidence sought, can be availed of as a ground to dispute the jurisdiction of the District Court in passing upon these questions, and in making its judgment of contempt. If each of the varying elements of weakness suggested were found by this court to exist, nevertheless should this court take the same course as that

followed by Mr. Justice Brown in the Hale case, namely to affirm the judgment of the lower court.

A case frequently cited on the subject of the definiteness required in a subpoena *duces tecum* is

United States v. Babcock, Case No. 14484,
Vol. 24, Fed. Cas., pp. 908-9.

There Circuit Judge Dillon thus expressed himself:

“The only other objection made was that the petition and writ do not sufficiently identify the messages, or show them to be in the possession of the company, and that the writ, in fact, requires the company to make search for these messages. We think that the objection is not made with a proper view of the statements of petition in that regard, and of the functions of the writ. It is very easy, if Mr. Orton or the company is not in possession of the papers, for them to come here and say, ‘We have no such papers.’ That excuses them to the court, if the court is satisfied that such is the fact. But some degree of certainty is undoubtedly required in undertaking to specify the papers, and we have looked through books which have been referred to by counsel and others, and we find the law and practice quite well settled. It is this: *The papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him, and to have the papers on the trial, so that they can be used, if the court shall then determine that they are competent and relevant evidence.*

* * * * *

“Here are dispatches which are alleged to be in the possession of the telegraph company,

which is no party to the suit, and to be material in order to inquire into the legal rights of the parties, and the writ would be just as available for the defendant, as for the United States, if he required the messages. The writ describes, with sufficient particularity, in deed, with *all the particularity that seemed to be practicable* under the circumstances, the very messages that are wanted. *Vasse v. Mifflin* (Case No. 16,895)."

As indicated by Judge Dillon in the case last cited, it has frequently been held that the subpoena *duces tecum* sufficiently discharges its function when it *advises the witness* exactly what books and papers were meant. It is nowhere suggested in this record that either Norcross or the Western Fuel Company did not know what books, papers and records were required by the subpoenas here challenged.

Judge Gresham, in

U. S. v. Distillery No. 28, Case No. 14966,
25 Fed. Cas. 869,

thus speaks on the subject of the sufficiency of a description in a subpoena *duces tecum*:

"The description of the books and papers in the written motion and the order of the court is substantially: Certain day books, journals, cash books, ledgers, blotter books, blotters, invoices, dray tickets, etc., kept, received and taken by the claimants in their business as distillers, rectifiers and wholesale liquor dealers between certain dates named and since the 23rd day of June, 1874, showing the amount of spirits produced, received, removed and sold by them dur-

ing the time named. The claimants were *sufficiently advised by this description what books and papers were meant*. No greater certainty of description was required to satisfy the statute. *U. S. v. Three Tons of Coal* (Case No. 16515), *Myer v. Becker*, Id. 1208."

It would unduly extend this argument to set out in detail the descriptions contained in the various writs of subpoena *duces tecum*, for disobedience to which, judgments for contempt have been imposed—and subsequently sustained by appellate tribunals. In many of them the descriptions of the documents sought were quite as broad as in the subpoenas here under attack. We content ourselves in this regard by calling attention to a few of the cases and indicating the page of the report where the description in the particular case is set out.

Nelson v. U. S., 201 U. S. 99-100;

In re-Consolidated Rendering Co., 66 Atl. 792; (80 Vt. 55).

This is the case in which the judgment of the Supreme Court of the State of Vermont was affirmed by the United States Supreme Court in the decision from which we have above quoted (207 U. S. 554).

U. S. v. Three Tons of Coal, 3 Biss. 379;

Fed. Cas. 16516; Vol. 24; p. 158, column 2;

Wilson v. U. S., 221 U. S. 367;

Wheeler v. U. S., 33 Sup. Ct. Rep. 159, Col. 2;

In re-Storror, 63 Fed. 567 (decision by Judge Morrow);

United States v. American Tobacco Co., 146 Fed. 557;

Santa Fe Pacific Ry. Co. v. Davidson, 149 Fed. 604 (decision by Judge Ross);

Hammond Packing Co. v. Arkansas, 212 U. S. 332-354; 53 L. ed. 530.

IV.

THE COMPULSORY PRODUCTION OF THE DOCUMENTS MENTIONED IN THE SUBPOENA DUCES TECUM WOULD NOT CONSTITUTE UNREASONABLE SEARCH IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

At the outset we again call attention to the fact that no violation of the fifth amendment to the Constitution as to immunity from self-incrimination is here presented. Neither Norcross, nor the Western Fuel Company urges any claim of that character. Both alike, take the position that the controversy, so far as they are concerned, is one between third parties—the Government of the United States on the one hand and the eight named defendants charged with conspiracy, and possibly other alleged fellow conspirators on the other. Counsel rely largely on the cases of *Boyd v. U. S.*, 116 U. S. 616-641 and *Hale v. Henkel*, 201 U. S. 43. The *Boyd* case, neither in its facts nor

in the principles enunciated in the opinion of the court, justifies counsel in his attack on the judgment for contempt, shown by this record. The Boyd case was not that of a corporation or one of its officers refusing, as against the Government, to permit the production of evidence shown by the corporate records or documents. The Boyd case involved the construction and constitutionality of section 5 of the Revenue Act of June 22, 1874. That act required the defendant, on motion of the Government attorney, to produce in court his private books, invoices and papers, failing which, the allegations of the Government attorney were to be taken as confessed. The court took the view that the statute was unconstitutional because it compelled the production of private papers of an individual *under penalty of forfeiture of his property*. The present case presents no question of threatened forfeiture of property by either contemnor.

The Boyd case surely does not warrant a reversal by this court from the judgment of contempt rendered by the District Court. The main question involved in the Boyd case is set out by Mr. Knight in the language of Mr. Justice Bradley, at pages 60-1 of his argument in this language:

“The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent, thereto, *a compulsory production of a man's private papers*, to be used in evidence against him in a proceeding to for-

feit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an ‘*unreasonable search and seizure*’ within the meaning of the fourth amendment of the Constitution? Or is it a legitimate proceeding?”

The Boyd case was urged upon the attention of the Supreme Court of the United States in connection with the refusal to produce documents required by an order of the Interstate Commerce Commission in the case entitled

Interstate Commerce Commission v. Baird,
194 U. S. 25-47.

Mr. Justice Day, in the opinion in that case said:

“The origin and interpretation of the 4th Amendment to the Constitution, securing immunity from unreasonable searches and seizures, was fully discussed by Mr. Justice Bradley in the leading case of *Boyd v. United States*, 116 U. S. 616, 26 L. ed. 746, 6 Sup. Ct. Rep. 524. In that opinion the learned Justice points out the analogy between the 4th and 5th Amendments, and the object of both *to protect a citizen from compulsory testimony against himself which may result in his punishment or the forfeiture of his estate, or the seizure of his papers by force, or their compulsory production by process for the like purpose*. In the course of the opinion it is said: ‘Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony or of his private papers *to be used as evidence to convict him of crime or to forfeit his goods* is within the condemnation of that judgment. In this regard the 4th

and 5th Amendments run almost into each other.

* * * * *

“As we have seen, the statute protects the witness from such use of the testimony given as will result in his *punishment for crime or the forfeiture of his estate*. Testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure.”

In the case at bar there is no possible question of unlawful seizure, nor is there any question of the forfeiture of estate. At page 870 the justice continues:

“Nor can we see force in the suggestion that these contracts were made with persons not parties to the proceeding. Undoubtedly the courts should protect nonlitigants from unnecessary exposure of their business affairs and papers. But it certainly can be no valid objection to the admission of testimony, otherwise relevant and competent, that a third person is interested in it.”

The Boyd case was again urged on the attention of the United States Supreme Court in *Hale v. Henkel*. Mr. Justice Brown in the opinion of the court, thus refers to that case:

“While the second ground does not set forth with technical accuracy the real reason for declining to produce them, the witness could not be expected to speak with legal exactness, and we think is entitled to assert that the subpoena was an infringement upon the Fourth Amendment to the Constitution, which declares that ‘the right of the people to be secure in their

persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

"The construction of this amendment was exhaustively considered in the case of *Boyd v. United States*, 116 U. S. 616, which was an information in rem against certain cases of plate glass, alleged to have been imported in fraud of the revenue acts.

* * * * *

"The history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was given at great length, and the conclusion reached that *the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime or a forfeiture of his goods, is illegal, 'is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—with-in the Fourth Amendment.'*

"Subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing separate functions. Thus in the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, the constitutionality of the Interstate Commerce Act, so far as it authorized the Circuit Court to use their processes in aid of inquiries before the Commission, was sustained, the court observing in that connection:

"It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of

witnesses, and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case.'

"The case of *Adams v. New York*, 192 U. S. 585, which was a writ of error to the Supreme Court of the State of New York, involving the seizure of certain gambling paraphernalia, was treated as involving the construction of the Fourth and Fifth Amendments to the Federal Constitution. It was held, in substance, that the fact that papers pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered, was not a valid objection to their admissibility; that the admission as evidence in a criminal trial of papers found in the execution of a valid search warrant prior to the indictment, was not an infringement of the Fifth Amendment, and that by the introduction of such evidence, defendant was not compelled to incriminate himself. The substance of the opinion is contained in the following paragraph. It was contended that 'If a search warrant is issued, for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these Amendments. We think they were never intended to have that effect, but are rather designed to protect against *compulsory testimony from a defendant against himself in a criminal trial*, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect."

"The *Boyd* case must also be read in connection with the still later case of *Interstate Com-*

merce Commission v. Baird, 194 U. S. 25, which arose upon the petition of the Commission for orders requiring the testimony of witnesses and the production of certain books, papers and documents. The case grew out of a complaint against certain railway companies that they charged unreasonable and unjust rates for the transportation of anthracite coal. Objection was made to the production of certain contracts between these companies upon the ground that it would compel the witnesses to furnish evidence against themselves in violation of the Fifth Amendment, and would also subject the parties to unreasonable searches and seizures. It was held that the Circuit Court erred in holding the contracts to be irrelevant, and in refusing to order their production as evidence by the witnesses who were parties to the appeal. In delivering the opinion of the court, the Boyd case was again considered in connection with the Fourth and Fifth Amendments, and the remark made by Mr. Justice Day that the immunity statute of 1893 '*protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate.*'

"Having already held that by reason of the immunity act of 1903, the witness could not avail himself of the Fifth Amendment, it follows that he cannot set up that Amendment as against the production of the books and papers, since in respect to these he would also be protected by the immunity act. *We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence.* As remarked in *Summers v. Moseley*, 2 Cr. & M. 477, it would be 'utterly impossible

to carry on the administration of justice' without this writ. The following authorities are conclusive upon this question: *Amey v. Long*, 9 East. 473; *Bull v. Loveland*, 10 Pick. 9; *U. S. Express Co. v. Henderson*, 69 Iowa, 40; *Greenleaf on Evidence*, 469a.

"If, whenever an officer or employe of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a *clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State.*"

The justice discusses the distinction between a private citizen and a corporation, a creature of the State, and then continues:

"Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature

to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how those franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. *While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."*

The Boyd case and the Hale case were both cited in support of refusal to produce books and documents in

Consolidated Rendering Co. v. Vermont, 207
U. S. 541-556.

The objection urged there to the production of the books and papers was "that the statute and notice authorized an unreasonable search and seizure of the private books and documents of the company." In disposing of this contention, the court said:

(52 L. Ed. 335) "Sixth: The objection that the notice authorized by the statute amounted to an unreasonable search and seizure

of the private books and documents of the company is also not well founded. In *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372, where the question was raised, the court refused to discuss the contention that the 14th Amendment made the provisions of the 4th and 5th Amendments to the Constitution of the United States, so far as they related to the right of the people to be secure against unreasonable searches and seizures, and to be protected against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they could not be deprived by the action of the state, because, on an examination of the record, the court concluded that there had been no violation of this restriction, either in the unreasonable search and seizure, or in compelling plaintiff in error to testify against himself."

The *Boyd* and *Hale* cases were again suggested to the Supreme Court by a witness refusing to produce corporate books and papers, in the case of

Wilson v. U. S., 221 U. S. 361.

In discussing the question of the efficacy of the fourth amendment to prevent the production of corporate books and papers, Mr. Justice Hughes, speaking for the court, said:

(p. 375) "*Nor was the process invalid under the 4th Amendment. The rule laid down in the case of Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524, *is not applicable here. In that case, an information for the forfeiture of goods under the customs act of June 22, 1874, (18 Stat. at L. 186, chap.*

39) U. S. Comp. Stat. 1901, p. 2018), it was held that the enforced production 'of the private books and papers' of the owner of the goods sought to be forfeited, under the provisions of section 5 of that act, was '*compelling him to be a witness against himself within the meaning of the 5th Amendment*', and was also '*the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the 4th Amendment.*' But there is no unreasonable search and seizure when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced.

* * * * *

"A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt.

* * * * *

(377) "For there can be no question of the character of the books here called for. They were described in the subpoena as the books of the corporation, and it was the books so defined which, admitting possession, he withheld.

* * * * *

(379) "We come, then, to the broader contention of the appellant,—thus stated in the argument of his counsel: 'An officer of a corporation who actually holds the physical possession, custody, and control of books or papers of the corporation, which he is required by a subpoena *duces tecum* to produce, is entitled

to the same protection against exposing the contents thereof which would tend to incriminate him, as if the books and papers were absolutely his own.' That is, the power of the courts to require their production depends not upon their character as corporate books and the duty of the corporation to submit them to examination, but upon the particular custody in which they may be found. If they are in the actual custody of an officer whose criminal conduct they would disclose, then, as this argument would have it, his possession must be deemed inviolable, and, maintaining the absolute control which alone will insure protection from their being used against him in a criminal proceeding, he may defy the authority of the corporation whose officer or fiduciary he is, and assert against the visitatorial power of the state, and the authority of the government in enforcing its laws, an impassable barrier.

(380) "But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrules his claim of privilege. This was clearly implied in the *Boyd Case*, where the fact that the papers involved were the private papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal de-

reliction. If he has embezzled the public moneys and falsified the public accounts he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-crimination. The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. *There the privilege which exists as to private papers cannot be maintained.*

* * * * *

(382) "The fundamental ground of decision in this class of cases is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the *custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.*

"What, then, is the status of the books and papers of a corporation which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement, and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection, or must be kept filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. * * * But the corporate form of business activity, with its chartered privileges,

raises the distinction when the authority of government demands the examination of books. *That demand, expressed in lawful process, confining its requirements within the limit which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the grounds of self-crimination.* Although the object of inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises, or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the state, and in the authority of the national government where the corporate activities are in the domain, subject to the powers of Congress.

“This view, and the reasons which support it, have so recently been stated by this court in the case of Hale v. Henkel, supra, that it is unnecessary to do more than to refer to what was there said.

* * * * *

(384-5) “The appellant held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of the law, he could not withhold the books, to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a recognition, but an unjustifiable extension, of the personal rights they enjoy. They may decline to utter upon the wit-

ness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers. *But the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian.*

“Nor is it an answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses. That, if the corporation had been so charged, he would have been compelled to submit the books to inspection despite the consequences to himself, sufficiently shows the absence of any basis for a claim on his part of personal privilege as to them; it could not depend upon the question whether or not another was accused. The only question was whether, as against the corporation, the books were lawfully required in the administration of justice.”

See also in this connection

Dreier v. U. S., 221 U. S. 394,

in which case also the recalcitrant corporation officer, urged in extenuation of his failure to produce documents, the case of *Boyd v. U. S.*, so strongly relied upon in the case at bar, by Mr. Knight.

A still more recent case involving the duty of a corporate official to produce corporate records, was decided by the Supreme Court of the United States

on January 6th of the present year, the case being entitled

Wheeler v. United States, 33 Sup. Ct. Rep.
158-162.

There, as in the case at bar, the corporate official urged that compliance with the subpoena *duces tecum* would constitute an unreasonable search under the fourth amendment to the Constitution of the United States. Mr. Justice Day, in disposing of this contention said:

(p. 162) "We are of the opinion that this case is virtually ruled by *Wilson v. United States*, supra. In that case it was held that there was no unreasonable search or seizure where the officer of a corporation, whose guilt of an offense against the laws of the United States was under investigation, was compelled to produce books and papers of the corporation of which he was president, because, as against the corporation, the true owner of the books and papers, their production might lawfully be compelled, and that there was no self-incrimination of such officer, because he was not compelled to produce his private books, but *the books of the corporation which were not within the protection given to the private books and papers of an individual*. We are unable to see that this case differs in principle from that one.

* * * * *

"But, as was held in the *Wilson* case, *the privilege of the Constitution against unreasonable searches and seizures does not protect against the lawful examination in due course of books of this character; nor does the privilege of individuals against self-incrimination in the production of their own books and papers prevent the compulsory production of the books of a corporation with which they happen to be*

or have been associated. It was the character of the books and papers as corporate records and documents which justified the court in ordering their production, as this court ruled in the Wilson case."

See also in this connection

Bornn Hat Co. v. U. S., 184 Fed. 506;

affirmed by the United States Supreme Court in 32 Sup. Ct. Rep. 521.

Hammond Packing Co. v. Arkansas, 212 U. S. 332; 53 L. Ed. 530.

Baltimore & O. Ry. v. Int. Com. Commission, 221 U. S. 612-622;

Santa Fe Pac. Ry. v. Davidson, 149 Fed. 603;

American Banana Co. v. United Fruit Co., 153 Fed. 943;

Grant v. United States, 33 Sup. Ct. Rep. 190.

IV.

THE DOCUMENTS DESCRIBED IN THE SUBPOENA DUCES TECUM SERVED ON NORCROSS AND THE WESTERN FUEL COMPANY AND WHICH JUDGE DOOLING ORDERED TO BE PRODUCED BEFORE THE GRAND JURY, WERE IN FACT ESSENTIALLY MATERIAL EVIDENCE FOR THE CONSIDERATION OF THE GRAND JURY IN THE INVESTIGATION OF THE FRAUDS CHARGED IN THE THREE INDICTMENTS AS AGAINST THE DEFENDANTS NAMED AND AS AGAINST THEIR FELLOW CONSPIRATORS, POSSIBLE DEFENDANTS IN FUTURE INDICTMENTS.

At page 67 of the printed argument, Mr. Knight states this proposition: "There is no proper found-

ation for the contempt proceedings relative to the character of the evidence sought to be produced.” The opening sentence under this heading is in this language: “Our last objection to the action of the learned court below adjudging appellant guilty of contempt is that it nowhere appears that he refused to give material or relevant evidence, or to produce documents which were material or relevant to any pending matter.” The question here presented is in substance the same as that discussed by us in subdivision I of this argument.

Of course we make no claim that either a subpoena *duces tecum*, or any other process of court, may be maliciously or wantonly used for the purpose of unlawfully annoying a party or witness for the mere pleasure of a fishing excursion for United States attorneys or the Government whom they represent. Grand juries and courts are not established for the encouragement of mere sport or wantonness as such. It certainly is not the conceived function or purpose of the officers of this court who present this argument to harass unduly fellow citizens of the United States whose conduct has been subjected to governmental investigation. While for the time being they are Government officials they are still officers of this court under obligation to make no improper use of its process. In subdivision I of our argument we demonstrated that a subpoena *duces tecum* requiring the production of papers by a witness before a grand jury may be issued as of course. The authority for such issuance

is the general Section 716, R. S. The requirements of Section 724 and Section 869 as to the preliminary application to the court and the requisite showing before the court will grant the application, had no bearing on the matter of the issuance as of course a subpoena *duces tecum* which is warranted by Section 716. No preliminary showing of materiality of testimony sought, is required. In passing on the question of contempt, the tribunal adjudging the contempt may, if the point be made, pass on the *fact of materiality* of the documentary evidence sought. The *fact of materiality*, not the matter of preliminary showing, especially where none is required, is the determining factor in this regard in the establishment of the contempt. No question can be predicated on the face of this record as to the immateriality of the documentary evidence mentioned in the subpoenas *duces tecum*, served on these contemnors. Neither Norcross, nor the Western Fuel Company, ever claimed that the evidence here sought was not material in an investigation of the conspiracy to defraud the Government charged in the three indictments shown by the record, as against the eight named defendants and their unnamed fellow conspirators.

Norcross and the corporation both attest, by their conduct, the absolute materiality of the documentary evidence described in the subpoena and directed by Judge Dooling to be produced.

In this connection we ask attention to the following language in the affidavit of Norcross, shown at page 78 of the record:

“Three sets of indictments have been returned against them and these indictments charge a continuing conspiracy from 1904 to June 1913.

“The trial of these indictments is set for Tuesday August 26th 1913 in this court. For several weeks past the attorneys have been requiring me to make up tables, compilations, summaries and statements from these books and *certain of these tables, statements and compilations are still uncompleted and these books are being made use of every day in the preparation of the defense of its officers and directors.* I am informed by the attorneys, and I believe, and I therefore state, that *they will continue to require the use of these books up to the time of trial which is only eight days from to-day.*”

If the books covered by the subpoena and by the order of Judge Dooling were absolutely essential for the defense of the eight alleged conspirators, they must have been material to the matter involved in the indictments mentioned and in possible further indictments against the same parties or others. If material in connection with the parties already indicted, they would be likewise material in the investigation of charges against the unnamed fellow conspirators of the indicted officers and employees of the Western Fuel Company.

Of the *fact of materiality of the testimony sought*, there can not be any serious question on the face of this record. Especially should this court incline to our view of this matter when the record shows that *no claim of immateriality was made at any stage of the proceedings either before the grand*

jury or before Judge Dooling, when he afforded both of these contemnors a full opportunity to be heard before he made his final order directing the production of the documents mentioned in the subpoenas *duces tecum*.

The fact of materiality is not here in question.

The several cases cited by Mr. Knight at pages 68 to 76 of his argument, deal with the proposition that a witness should not be punished for contempt if it appear that the testimony sought to be elicited from him under compulsory process was not material to the determination of any issue presented, or any subject matter under legitimate investigation. Counsel devotes several pages to an extended quotation from *Ex parte Clarke*, 126 Cal. 235. The release of a prisoner on habeas corpus in that case was based on the *fact* that the evidence which the court sought to compel him to produce was not material to the cause of the party who sought its production.

At page 240, Mr. Justice McFarland says:

“There was no showing by affidavit or otherwise that the books in question contained any evidence material to plaintiff’s cause; the only evidence on the point was the testimony of petitioner when on the witness stand as plaintiff’s own witness, and *that showed that they did not contain such evidence.*”

The record here before the court shows through its every page the fact that the evidence here sought is material in the determination of the question

whether or not the defendants named in the three indictments and their fellow conspirators were guilty of fraud in connection with the weights of coal cargoes received and portions thereof subsequently delivered to other ships, as mentioned in the indictments. If material as to the eight named defendants, they were material likewise in the investigation of the frauds on the part of other alleged conspirators.

We again invite attention to the case of

U. S. v. Babcock, 3 Dill. 566; Case No. 1484;
24 Fed. Cas. 909.

Judge Dillon there said:

“But Mr. Shepley suggested, in argument, that there was no sufficient showing here that these papers were material. * * * It is to be observed that the district attorney does state that these papers are material evidence in the case, but, *whether they are material or not, is a question which cannot be determined in advance—that depends upon the actual posture and situation of the case when they come to be offered*; and when the district attorney asserts that they are material papers, we must assume, for the present, that he is fully informed, and that they are material.”

In considering a similar question, Judge Lacombe, in

Edison Electric L. Co. v. U. S. Electric L. Co.,
44 Fed. 296,

said:

“This argument deals, of course, with the materiality of the proposed evidence when pro-

duced, and to this motion, which is practically directed to securing its presence in court, the complainant objects that the evidence, if produced, would be immaterial. That question, however, should not be determined upon application to produce the papers. The court should pass upon it with the proposed evidence before it, so that it may act intelligently, and that an exception to its refusal to admit the testimony, should it so refuse, may be of avail to the exceptant upon appeal. *If the only objection to admitting these documents in evidence be that they are immaterial, that objection is of no avail in opposition to an application which calls for their production.* Without therefore finally determining the question as to the materiality of these documents, it is sufficient to say that, in view of the contract relations between Edison and the company, and of the rule of law as to the admissibility of a party's admissions, and in view of the effect accorded to such admissions in the case cited by defendant (*Giant Powder Co. v. California etc. Co.*, 4 Fed. Rep. 720), and, finally, in view of the contents of the documents as disclosed by the moving papers, there is not found in the objection as to the materiality of the evidence sufficient to warrant the refusal of the officers of the corporation to obey the subpoena *duces tecum*, and to produce the documents, which are concededly in the hands of its counsel, subject to its orders and under its control."

In this connection we again ask the court to bear in mind that counsel for contemnors insist that the very evidence here sought, had at one time been placed by the corporate officials in the hands of the federal officials and that a wrongful advantage had been taken of such action by the Government

in having the indictments found, which are set out in the record. If on such foundation, indictments already had could be found by jurors presumably discharging their oath-bound duty, possibly other indictments based on the same foundation might be found against the unnamed fellow conspirators. In any event, the documentary evidence was, as it must have been, material in the investigation of the frauds charged in the three indictments as against the named defendants and other unnamed fellow conspirators.

We again ask attention to the case of

Nelson v. U. S., 201 U. S. 92.

At page 111, Mr. Justice McKenna, speaking for the court says:

“Plaintiffs in error urge three main contentions, which we will consider in their order.

“I. That the evidence, documentary and oral, which the witnesses were required to produce, was not shown to be material to plaintiff’s case.

“1. There are three answers to this contention. (1) The evidence is clearly material. The charge of the bill is that the defendant manufacturing corporations entered into a conspiracy and combination in violation of the act of July 2, 1890, to suppress competition between themselves, and that they accomplished this purpose by organizing the General Paper Company, and gave it certain controlling powers over the output of the mills and the prices and distribution of their products.

“Before the application to the court for the orders under review there were certain facts established.”

After showing the relevancy of the matters called for by the subpoena, to the pending investigation, Mr. Justice McKenna continues at page 112:

“At any rate, the manner in which the paper company executed its functions may be links in the evidence adduced by the United States, and this is enough to establish the materiality of the evidence.”

At page 114 the learned Justice continues:

*“The claim of immateriality of the testimony cannot avail plaintiffs against the orders of the Circuit Court. * * **

“The testimony is taken to be submitted to the court where the suit is pending and all questions upon the evidence, its materiality and sufficiency, are to be determined by it and after it by an appellate court.

* * * * *

“These writs of error are not prosecuted by the parties in the original suit, but by witnesses, to review a judgment of contempt against them for disobeying orders to testify. *Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issues between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal.*”

SUMMARY.

On the facts disclosed by this record and the law bearing thereon, as established by the federal statutes and the adjudications of the courts of the United States, we are convinced that the judgment of District Judge Dooling cannot be successfully attacked for lack of that jurisdiction which makes a con-

tempt judgment final. The identical evidentiary matters covered by the subpoenas and by the final order to produce, made by Judge Dooling, served as the basis of the three indictments set out in this record. These identical papers might properly be relied on by the Government as *material* evidence in further investigation as to possible criminal conduct by fellow conspirators of the parties already indicted, including Government employees and officials of vessels in the import trade, as well as those on out-going vessels of American register.

Under the general powers of courts of the United States exercising criminal jurisdiction and necessarily inherent common law functions, subpoenas *duces tecum* are issuable as of course out of the office of the clerk of the court in whose aid a federal grand jury acts in the administration of the criminal law. Such grand jury exercises inquisitorial powers, acting on matters originating on the initiative of the jurors themselves, or otherwise. To the rightful exercise of its inquisitorial jurisdiction, no preliminary charge is essential. Without known defendant or specific pending charge, its duty is to inquire without offense or public warning to one under investigation who may be absolutely innocent of criminal conduct, whether, within the territorial jurisdiction of the court, a crime or public wrong has been committed, and without fear or favor, present its honest finding to the appropriate court. The successful exercise of its functions demands the secrecy of investigation en-

joined by the official oath administered when entering upon its duty. Men innocent of even apparent wrongdoing should not by public process be unnecessarily presented to public observation as persons already victims of a formal charge of crime.

Malefactors, reeking with guilt, should not, by formal forewarning of impending investigation, be afforded timely suggestion and open avenue of escape. Neither a defendant named in anticipation of a charge, nor a charge as yet unestablished, is an essential ingredient of a valid subpoena requiring from a witness either personal attendance and oral evidence, or production of evidentiary documents. Witnesses or written instruments alike may be coerced into the service of the state without compelling in advance, judicial determination of the absolute relevancy or materiality of the testimony conscientiously sought by sworn and impartial public investigators. The law indulges the presumption of faithful discharge of public duty. A witness, whether a party to a pending controversy or not, may not judicially determine for himself, as against the Government process, the relevancy or materiality of the evidence sought from him or through him. If likely to subject himself to criminal charge or prosecution by his spoken word, or production of his private written instruments, he may well say to whomsoever attempts to coerce him, that the spirit of the English and American law gives him the sanctuary of secrecy and immunity against self-immolation on the altar of public sacrifice.

The corporate creation of the state, however, may not arrogate to itself or its official representative the immunity which our institutions give only to the natural private non-corporate citizen.

We reiterate, no original application for subpoena *duces tecum*, nor action by the District Court thereon was requisite to the lawful issuance and enforcement of the writ. No specific charge stated in the writ nor culprit named therein was essential to its validity as process from the District Court. No antecedent scheme or purpose of investigation on the part of the grand jury was requisite to the validity of the process or the proper exercise of inquisitorial powers by that body. The absolutely established *factual materiality of the evidentiary instruments* covered by the subpoenas and by Judge Dooling's order is manifest on every page of the record here before the court. Such materiality was nowhere questioned either by Norcross or by the Western Fuel Company, before the grand jury, or before Judge Dooling. Judge Dooling's judgment was within the unquestioned jurisdiction of his court. It was warranted by the facts and the law. It should be neither questioned nor disturbed by this appellate tribunal.

Dated, San Francisco,
November 22, 1913.

Respectfully submitted,

MATT I. SULLIVAN,

THEO. J. ROCHE,

*Assistants to the Attorney General
of the United States.*

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID C. NORCROSS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 2329

In the Matter of the Application of
David C. Norcross for Writ of Habeas
Corpus.

DAVID C. NORCROSS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2328

WESTERN FUEL COMPANY

(a corporation),

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2327

PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

Appellant and plaintiffs in error hereby respectfully petition for a rehearing of these cases and assign the following grounds therefor:

The objections raised by us to the subpoena *duces tecum* in question were all summarily overruled, without discussion, on the authority of three cases whose dissimilarity from the cases at bar we endeavored to show on the argument, and to these cases a brief reference will be hereafter made.

On the day the record in these cases was filed, counsel for the Government urged haste in having them heard during the past term, and, after the argument, asked for a speedy decision because of the trial which was about to take place in the District Court, for which the books, papers and documents called for were wanted by the prosecution; and we cannot but feel, with all due respect to the court, that the lack of time which the court felt was at its disposal precluded that consideration of these cases which they would have received had they taken their normal course.

The prime importance of the principal questions here involved, regardless of the parties now affected by the decision, impels us to again, although briefly, urge the court to re-examine our position in view of the acknowledged facts of the case and in the light of prior pertinent adjudications, thereby preventing the

creation of a precedent, at least in this circuit, fraught with the gravest consequences in the administration of the criminal law, where constitutional methods may be lost sight of in the zeal of the prosecutor. The decision will be comparatively unimportant as far as the custody of these books and papers are concerned, for all of them are being deposited, by agreement, with the clerk of the trial court and there made accessible to the Government for such use as may be properly made of them; and there remains merely the fine of \$2000 imposed upon the Western Fuel Company. The importance of the decision, however, lies in the effect it will have upon the practice of the federal criminal law in this circuit.

If this decision is allowed to stand, then it follows that, on the eve of trial of parties charged with the commission of an offense against the federal laws, a United States grand jury, at a prosecutor's instance, can virtually ransack the office of a company under whose "guise and name" the defendants are charged with having entered into a criminal conspiracy, and obtain the production of every writing, book, paper and record registering its countless business transactions amounting to two dray loads in quantity and extending over the entire life of over ten years of such corporation, merely for the purpose of obtaining evidence in that case, and not for the purpose of presenting fresh charges against anyone, or of correcting those already made. In view of the virtually uncontradicted facts of these cases, the court,

by its decision, thus sanctions the perversion of the functions of the grand jury and its use in aid of the Government in the preparation of the prosecution of a pending criminal trial. We respectfully insist that, from the record in these cases, the decision of this court can mean nothing else.

The party objecting to this procedure is not a defendant about to be tried, and is not based upon the plea of self-crimination, but is the company itself, a third party to the main controversy, which owns and was in possession of the papers sought to be obtained.

We again briefly ask the court's attention to the two principal objections raised by us to the subpoena under consideration, the other points being largely matters of practice which were only adverted to upon the argument as showing in these particular cases a failure to follow a procedure sanctioned by the highest authority; and in considering these two objections we ask the court to bear in mind that if any doubt can arise respecting our constitutional rights in the premises, we are entitled to invoke the rule laid down in

Boyd v. U. S., 116 U. S. 616; 29 L. Ed. 746,

that constitutional provisions for the security of persons and property must be liberally construed in favor of those thus seeking protection.

1. THERE MUST BE A PROCEEDING OR INVESTIGATION OF SOME KIND PENDING BEFORE THE GRAND JURY HAVING, FOR ITS OBJECT, THE FINDING (OR IGNORING, AS THE CASE MAY BE) OF A PRESENTMENT OR INDICTMENT AGAINST SOME KNOWN OR UNKNOWN PERSON, AS A PRE-REQUISITE TO THE RIGHT OF THE GRAND JURY TO TAKE EVIDENCE. THE GRAND JURY CANNOT BE USED MERELY TO COLLECT EVIDENCE FOR USE OF THE PROSECUTOR IN A PENDING CRIMINAL CASE.

We venture to say that no report of any case can be found in any jurisdiction, either American or English, which upholds the right of the Government to utilize the grand jury for the sole purpose of obtaining information in the prosecution of a criminal case, such as was attempted here; nor can any authority be found which, dealing with this particular subject, has not, directly or inferentially, held that there must be some investigation against known or unknown parties by a federal grand jury in order to enable the Government to compel the production of oral or documentary evidence before that body. The inquiry may be of wide scope or it may be comparatively restricted. It may be against known parties or parties whose names or whose connection with an alleged offense are unknown, but there must be an inquiry of that character.

The record shows here affirmatively that there was no such inquiry. After appellant and plaintiff in error had been called before the grand jury two or three times the object of the proceeding became apparent to him and then he sought the advice of counsel. Documentary information relative to the case of *United States v.*

Howard et al., was wanted, and nothing else; and when this information was not immediately forthcoming, *the trial of that case was repeatedly postponed in the District Court, and by reason of the pendency of that trial at an early date*, the Government's counsel sought and obtained consideration of these cases by this court in advance of their due course. If the subpoena *duces tecum* had nothing to do with that pending trial, these cases would not have been heard in their regular course until the next February term.

This court in observing that

“the subpoena did not contain the usual *ad testificandum* clause”

did not perhaps grasp the force of our objection in this respect. We do not claim that the failure of the subpoena to call upon the witness to testify nullifies its command to produce the documentary evidence. It is abundantly established that a subpoena *duces tecum* may require a witness to produce documents without calling upon him to testify. The omission in the subpoena to call on the witness to testify, therefore, is immaterial; but our point in this respect is that *it did not refer to any proceeding pending before the grand jury, or to any charge, specific or otherwise, against any person, known or unknown*; and our contention is that the absence of a legitimate proceeding before the grand jury, as shown by the evidence, and illustrated by the subpoena, makes any commitment based thereon void. If the court will read the subpoena issued in the *Wilson* case found in the mar-

ginal notes thereof (55 L. Ed. 774), it will be observed that it did refer to a proceeding pending before the grand jury; and in its opinion the Supreme Court refers to that proceeding. This point was there decided merely by a reference to *Hale v. Henkel*, *post*. The *Wheeler* and the *Shaw* cases, also cited by this court to sustain its general conclusion, do not touch the subject. The point was not adjudicated because the record in each of those cases (which were heard together and involved the same parties) shows that the grand jury had a matter under investigation, to wit: the alleged criminality of Wheeler and Shaw, as officers of the Wheeler and Shaw Company, when it called for the books of the latter.

The only remaining recent case on the subject,

Hale v. Henkel, 201 U. S. 43; 50 L. Ed. 652,

directly affirmed in the *Wilson* case, holds, in effect, that a grand jury must have under consideration some action against somebody in order to entitle it to take evidence. It may not know just what criminal offense, if any, this evidence, when completed, may establish; it may not know what persons may be implicated; *but in order to enable it to take action, it must be contemplating some other result than furnishing the district attorney with ammunition for use in a trial about to be heard.*

In that case there was a matter pending before the grand jury of which it could take cognizance; and in delivering the court's opinion, Mr. Justice Brown,

quoting with approval a former eminent member of that court, said, with reference to grand juries:

"They are not appointed for the prosecutor or for the court, they are appointed for the Government and for the people." (Italics ours.)

In the cases before the court there was no indictment laid before the grand jury, and can the court say that the latter body was proceeding with the view to a presentment? Mr. Justice Brown, adopting Blackstone's definition of a presentment said:

"A presentment, properly speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them, at the suit of the king, as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer. * * *

A presentment may be based, not only upon their [grand juries'] own personal knowledge, but from the examination of witnesses."

It is impossible to read ~~that~~^{this} decision without reaching the conclusion that in order to enable it to receive evidence, there must be some matter pending before the grand jury of which it can properly take cognizance; and in that case there was a proceeding of that kind so pending.

That eminent New York criminal jurist, Judge Goff, said in a much cited case,

In re Morse, 87 N. Y. Supp. 727,
that

"The grand jury being an adjunct of the court is considered a part thereof, and *that grand juries*

"cannot institute a new and independent inquiry for the purpose of eliciting additional testimony to supplement or strengthen the testimony on which the indictment was found, or to aid the prosecutor in the trial of the case." (Italics ours.)

This court, by its present decision, is flatly deciding to the contrary.

Now, if the subpoena in this case had conformed to the practice and correctly set out the fact, the witness would have been thereby apprised that he was called upon to produce documentary evidence before the grand jury in a case pending in the U. S. District Court entitled "*United States v. John L. Howard et al.*"

We say the facts are undisputed. The opinion in this case recites that

"there is no substantial dispute as to the facts; indeed, most of the facts are expressly agreed to."

The attempt of the learned counsel for the Government in their brief to make it appear that there is a finding in the record as to the pendency of a legitimate investigation before the grand jury, is not supported by the record. The grand jury's presentment (record, p. 26), presumably prepared by counsel although signed by the foreman, does state that appellant was sworn to

"testify as a witness in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated and committed by said Western Fuel Company against the United States;"

(as to which, we may parenthetically remark, indictments had been found and the jury's duty in this respect was *functus officio*).

See

In re Morse, supra.

And it is true that in the judgment of the learned court below (record, p. 20) it is stated that appellant was sworn to

“testify as a witness in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated against the United States,”

which clause, omitting the name of the alleged offender, closely follows the language of the presentment; but, of course, the judgment is only effective when founded on facts established by the record, and the presentment or complaint, so to speak, falls if not supported by the evidence. Now, the foreman of the grand jury (record, pp. 97-101) denied that there was any such proceeding pending before the grand jury despite the language of his presentment, and special counsel for the Government admitted (record, pp. 80-81, 88-89, 90-93) that there was no such proceeding pending when the books and papers were demanded; and, furthermore, when we sought to bring out this fact they *denied that the showing was material* (record, p. 90), counsel taking the same position there as here, that it made no difference whether or not there was anything pending before the grand jury, or what their purpose was in calling for the company's records.

We respectfully submit that the conclusion reached by this court on the subject is at variance with all recognized authority, state and federal, and imposes on a grand jury duties wholly foreign to the spirit and genius of our institutions.

2. THE SUBPOENA WAS UNREASONABLE AND VIOLATIVE OF THE 4TH AMENDMENT TO THE U. S. CONSTITUTION.

Each of the three cases on which this court relied in reaching its decision is based upon the proposition that a person charged with the commission of crime cannot invoke the 5th amendment and plead self-crimination as an excuse for refusing to produce books of a corporation in his possession or under his control. We again expressly disavow self-crimination as a defense, but this court seems to have so inseparably connected the 4th and 5th amendments to the federal Constitution as to make a violation of one depend upon a violation of the other, and inability to plead one follow inability to plead the other. Self-crimination sought to be obtained by process contrary to the 5th amendment may also make that process invalid under the 4th amendment as constituting an unreasonable search or seizure. *Process, however, directed to a corporation or an officer thereof may constitute an unreasonable search or seizure without involving the element of self-crimination.* This is illustrated in the case of

Hale v. Henkel, supra,

where the court said that cases subsequent to the *Boyd* case

“treat the 4th and 5th amendments as quite distinct having different histories, and performing separate functions,”

citing several authorities to support its conclusions.

“ * * * We do not wish to be understood as holding that a corporation is not entitled to immunity, under the 4th amendment, against unreasonable searches and seizures.” * * * “We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th amendment.”

Said the court further with respect to the subpoena then under consideration:

“Applying the test of reasonableness to the present case, we think the subpoena *duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union.

“If the writ had required the production of all the books, papers, and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not

shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. [Italics ours.]

Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426; *Shaftsbury v. Arrowsmith*, 4 Ves. Jr. 66; *Lee v. Angas*, L. R. 2. Eq. 59."

This last paragraph is applicable *in haec verba* to the cases now before the court, substituting the name of Western Fuel Company for that of MacAndrews & Forbes Company.

In the *Wilson* case the subpoena merely called for the production of letter press copy books of a corporation containing copies of letters and telegrams covering only a period of two months, May and June, 1909.

In the *Wheeler* and *Shaw* cases, apparently heard together, the subpoena merely called for the books of account and copies of letters and telegrams extending over a period of fifteen months. The point of the decision in the *Wilson* case is that a person charged with crime who had in his possession the books of a corporation, of which he was president, could not thwart the efforts of the directors of that corporation

by refusing to produce these records, on the ground that their production would lead to self-crimination; and the point in the *Wheeler* and *Shaw* cases is that persons whose acts were under investigation by the grand jury could not, under the plea of self-crimination, refuse to produce, under a subpoena *duces tecum*, books and papers then owned by them but formerly belonging to a corporation which had become dissolved, the court holding that these records, having once been impressed with a corporate character, did not lose it by passing into private ownership.

On the question of the unreasonableness of the subpoena the records in the cases of

Hale v. Henkel, and

In re American Sugar Refining Company, supra, are far more closely analogous to the record in the cases under consideration than the records in the cases relied upon by this court, as their examination will disclose. There is a vast difference between a demand, on the one hand, which calls for correspondence covering only a period of two months (*vide* the *Wilson* case) or a demand covering books of account and correspondence covering a period of fifteen months (*vide* the *Wheeler* and *Shaw* cases), both of which were held reasonable, and, on the other hand, a demand, which was held unreasonable, for all agreements and correspondence between a certain company and six other firms or corporations associated with it from the date of the organization of that company, reports and accounts rendered by these associated interests to the principal company, correspondence be-

tween the latter since the date of its organization with thirteen other companies connected with it, and contracts with the principal company and four other tobacco companies (*vide* the *Henkel* case), or a demand, also held unreasonable, for the papers specifically mentioned in a certain subpoena *duces tecum* consisting entirely of contracts, communications and correspondence between certain named parties (*vide* the *American Sugar Refining Co.* case), or, finally, the demand, as in this case, for all books, papers, records and vouchers of Western Fuel Company showing its entire coal business in detail for over ten years, the length of its whole corporate life, and all weekly, monthly and yearly financial and other reports made to the directors of that company, and its minute books of stockholders' and directors' meetings during that period, and all stock ledgers, stock journals, stock certificate books showing the various shareholders of that company for the same period, as well as all ledgers, cash books and papers showing the financial conduct of its business during the same period, which, according to the uncontradicted evidence of the company's secretary, included

“the production of all the books the company has. To produce them would involve a suspension of the company's business. They are so numerous that it would take two express wagons to carry them out to the grand jury room (record, p. 78).”

And this demand was made less than two weeks before the date of a trial *which was postponed because the demand was not complied with.* The *Wilson*,

Wheeler and *Shaw* cases do not compare with the *Henkel* and *American Sugar Refining Company* cases as authorities upon the reasonableness of the subpoena in question.

As we said at the time of the argument, appellant is under a subpoena *duces tecum* to produce these books and papers at the time of the trial in the District Court. We have not raised any question as to that subpoena, because we are in a position to protect ourselves upon the trial. Furthermore, a legitimate investigation has now been instituted before the grand jury and new subpoenas have been issued, correcting the defects complained of in the subpoena under consideration. These are being obeyed.

We are not contesting the subpoena now under consideration captiously, or merely for the purpose of gaining time. No purpose can be subserved thereby. The court knows that we willingly joined in expediting the hearing of these cases in this court. The books and papers are, moreover, as we have already said, now being placed in *custodia legis*, taken there in installments, so as not to produce a suspension of the business of plaintiff in error Western Fuel Company by denuding it of every record and paper that it has.

If the judgment of the learned court below is affirmed, the conclusion drawn thereby from the facts of these cases becomes so harsh and so drastic, that the court may well pause before sanctioning it; and we,

therefore, earnestly ask for a reconsideration of the decision herein.

Respectfully submitted,

SAMUEL KNIGHT,

STANLEY MOORE,

*Attorneys for Appellant, Plaintiffs in
Error and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel in the foregoing cases; that in my judgment the petition herein is well founded and is not interposed for delay.

2 Dec/13

SAMUEL KNIGHT,

*Of Counsel for Appellant, Plaintiffs in
Error and Petitioners.*

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

DAVID C. NORCROSS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee. } No. 2329

In the Matter of the Application of
David C. Norcross for Writ of
Habeas Corpus.

DAVID C. NORCROSS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error. } No. 2328

WESTERN FUEL COMPANY

(a corporation),

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error. } No. 2327

**Memorandum in Reply to Petition of Appellant and
Plaintiffs in Error for a Rehearing After Decision,
Filed Herein November 20, 1913.**

The undersigned, assistants to the Attorney
General of the United States, respectfully submit

the following memorandum for consideration of the court, in connection with the petition for rehearing heretofore filed herein by attorneys for appellant and plaintiffs in error.

When the above entitled matters were reached on the calendar, Mr. Samuel Knight, one of the attorneys for appellant and plaintiffs in error, at the conclusion of his oral argument asked leave to file a printed copy of the same, and such printed copy was subsequently filed. The undersigned attorneys for the government were also permitted to file a printed reply to the argument of Mr. Knight. In advance of the filing of such brief by the attorneys for the government, this honorable court on November 20, 1913, filed its decision and opinion under and by which the judgment of the District Court was affirmed. The printed brief in reply to the argument of Mr. Knight, was subsequently filed on the 22nd day of November, 1913. That brief was prepared with some elaboration, and contains on the page facing the title page an index to the statement of the facts and law argument and references to the various pages of the document, in which the several matters of fact and law are discussed. In addition, it contains on preceding pages a list of authorities cited or referred to by counsel on either side of the controversy. It is respectfully requested that if need be, in determining the action of the court on the petition for rehearing heretofore filed, the brief above referred to, together with the authorities therein cited, may be taken into consideration by the court.

The main reliance of counsel for appellant and

plaintiffs in error on the oral argument of counsel and in the petition for rehearing is based on two decisions of the United States Supreme Court, namely, *Boyd v. U. S.*, 116 U. S. 616; 29 L. Ed. 246; and *Hale v. Henkel*, 201 U. S. 43; 50 L. Ed. 652.

At pages 64 to 80 of our printed brief on file herein, we discuss the proposition that

“The compulsory production of the documents mentioned in the subpoena *duces tecum* would not constitute an unreasonable search in violation of the fourth amendment to the Constitution of the United States.”

The *Boyd* case, as we there contended, concerned the *compulsory production of a man's private papers* in aid of an effort by the Government *to secure a forfeiture of his individual property*—not the production by an officer of the books or papers of the corporation under investigation by a grand jury.

The case of *Hale v. Henkel*, when analyzed, is found to be a distinct affirmative authority in favor of the position here taken by counsel for the Government. The court there affirmed the contempt judgment of the lower court. The ruling made by this court in the cases at bar is directly supported not only by *Hale v. Henkel* but by the cases cited in the opinion of Circuit Judge Ross, speaking for this court.

Dated, San Francisco,
December 4, 1913.

Respectfully submitted,

MATT I. SULLIVAN,

THEO. J. ROCHE,

*Assistants to the Attorney General
of the United States.*

